Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,

PETITIONER,

v.

CHRIS BARBER, CLAUDETTE BARBER, AND ALLIED WASTE INDUSTRIES, INC.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Chris Barber was injured in a grade crossing accident and filed a negligence action against petitioner, Union Pacific Railroad Company. The jury awarded $5.1 million in compensatory damages and $25 million in punitive damages. The Arkansas Supreme Court affirmed. The court held that the punitive award was not excessive, citing evidence that UP had received complaints about the height of the weeds at the crossing and failed to cut them prior to the accident, had followed an industry-wide practice of emphasizing profits over safety, and failed to preserve records that might have been relevant. Petitioner believes that this is the highest punitive damages award ever upheld in a grade crossing case. The petition presents the following questions:

1. Whether the Arkansas Supreme Court erred when it held—in conflict with the standards established by this Court and other lower courts—that the punitive damages award conformed to due process.

2. Whether the Arkansas Supreme Court violated the Supremacy Clause when it held—in conflict with the rule followed by this Court and the Courts of Appeals for over a century—that it could affirm the general verdict of a jury permitted to consider a federally preempted theory of negligence so long as the jury might have based its verdict on an alternative theory.

RULE 29.6 STATEMENT

Petitioner Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation.

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court (Pet. App. 1a-42a) is reported at 2004 WL 352525 and 2004 Ark. LEXIS 128. The oral ruling of the trial court is unreported and appears at Pet. App. 43a-49a.

JURISDICTION

The Arkansas Supreme Court affirmed the judgment on February 26, 2004. A timely petition for rehearing was denied on April 8, 2004. Pet. App. 50a-51a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 52a-54a) reproduces the text of the Supremacy Clause, U.S. Const. art. VI, cl. 2, the Due Process Clause, U.S. Const. amend. XIV, § 1, and the provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*, involved in this case.

STATEMENT OF THE CASE

This case involves a $25 million punitive damages award arising out of a railroad grade crossing accident. On January 19, 1998, a Union Pacific ("UP") train collided with a truck in St. Francis County, Arkansas. Pet. App. 1a-2a. The driver of the truck was killed, and the passenger, Chris Barber, was injured. *Id.* at 2a. Barber and his wife sued UP and the train engineer for negligence. The complaint "alleged that the accident was caused by Union Pacific's failure to control vegetation within its right-of-way ... , failure to properly sound audible warning devices, failure to keep a proper lookout, and operating the train at an excessive speed for the conditions." *Id.* The jury found in favor of the engineer, implicitly rejecting the "failure to properly sound audible warning devices" and "failure to keep a proper lookout" theories of negligence. But it returned a general verdict against UP, and awarded $5.1 million in compensatory damages and $25 million in punitive

damages. The Arkansas Supreme Court affirmed even though it assumed that one of the theories of negligence submitted to the jury may have been preempted by federal law.

To petitioner's knowledge this is by far the largest punitive damages award ever upheld by an American court in a railroad grade crossing case, even though there was no proof of intentional misconduct by UP. The Arkansas Supreme Court instead relied on evidence of corporate profits and fictional corporate safety "policies" that plaintiffs' attorneys can and will allege in every case against corporate defendants, eviscerating this Court's holding that substantial punitive awards must be reserved for genuinely reprehensible conduct. And the 5:1 ratio approved here, even in the face of a $5.1 million compensatory award, threatens to write out of the law entirely this Court's admonition that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). If that rule does not apply here, it is a dead letter.

Background And The Evidence At Trial

1. *Vegetation.* The Barbers' complaint asserted that UP failed "to control vegetation within its right-of-way." Pet. App. 2a. Evidence at trial demonstrated that vegetation had grown high enough to limit visibility to the east of the crossing. Abst. at 153-55.[1] Plaintiffs called an accident reconstruction expert who testified that a motorist 50 feet from the crossing could see 270 feet to the west, but only 63 feet to the east. *Id.* Although the train that hit Mr. Barber *actually came from the west* (Pet. App. 2a), plaintiffs

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[1] "Abst." citations refer to the abstracts of the record filed with the Arkansas Supreme Court. "Add." citations refer to the concurrently filed addendum.

theorized that a motorist could be so distracted when attempting to see past weeds to the east that he might miss an obvious train coming from the west. Abst. at 154-56, 159.

In support of this negligence claim, plaintiffs offered testimony that UP had received complaints about the vegetation at the crossing prior to the accident, and testimony from several persons who claimed to have witnessed "near miss" accidents at this crossing before. It was undisputed, however, that none of those witnesses could identify the trains in question as UP trains (another railroad operates on this track)—and none of them notified UP about the near misses. Pet. App. 15a-18a. There was also no evidence of prior accidents at this crossing. Further, the evidence showed that "Union Pacific entered into a contract with Tweedy Contractors to clear the vegetation four months prior to the accident," an action which two justices of the Arkansas Supreme Court characterized as "specifically taking affirmative steps to remedy any vegetation problems at Crossing 123, thereby demonstrating a lack of malice." *Id.* at 41a-42a (Dicky, C.J., and Thornton, J. dissenting).

2. *Train speed.* The plaintiffs also alleged that UP operated "the train at an excessive speed for the conditions." Pet. App. at 2a. When UP argued that federal law preempts the entire "subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings," under *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 675 (1993), plaintiffs amended their complaint to allege that UP "failed to issue a 'slow order' calling for a speed restriction over that rail crossing." Pet. App. 4a. (A slow order is a voluntary reduction in the otherwise federally mandated "speed limit" for a particular length of track). UP argued that plaintiffs' "slow order" claim was merely an excessive speed claim in another form, and moved in limine to exclude all "evidence or argument that the train was traveling at an excessive speed." *Id.* at

4a-5a; Abst. at 18-28. The trial court granted the motion as to claims directly asserting excessive speed, but inexplicably "not as to whether they negligently failed to issue slow orders." Abst. at 41; *see also* Pet. App. 5a. UP objected to any testimony on the subject of slow orders. Abst. at 98. The trial court overruled UP's objection, *id.*, but granted UP a continuing objection to any such testimony. *Id.* at 100.

The federal track inspector with responsibility for this area testified that he had inspected the track, and that it was "Class 4" track safe for travel up to 60 miles per hour. Affidavit of Roy A. Cline, Add. at 356-57; *see also* 49 C.F.R. § 213.9(a). It was undisputed that the train in this case was traveling slower than that. Abst. at 18-19. Nonetheless the trial court allowed a former UP employee to testify that *he believed* the track was not maintained to the federal 60-mile-per-hour standard, and that "[i]f the track isn't maintained to 60 miles per hour, then you are supposed to issue a slow order." *Id.* at 92. That employee admitted that he does not know the difference between Class 4 and lower grades of track. *Id.* At the close of plaintiffs' case, UP moved for directed verdict on all speed-related claims, arguing that "negligent failure to issue a slow order is nothing more than an excessive speed claim using different words." *Id.* at 166. The court denied this motion. Pet. App. 5a.

3. *Nationwide corporate "policies".* In an effort to establish culpability, plaintiffs launched a broad attack on nationwide corporate "policies" of UP and the entire rail industry. First, they called an economist, Dr. Harvey Levine, who claimed to divine UP's corporate "policy" about railroad safety from an examination of UP's filings with the Surface Transportation Board and the Securities and Exchange Commission. Abst. at 124-26. Dr. Levine testified, on the basis of those filings and his prior experience in the railroad industry, that UP participates in an *industry-wide* national "policy" of "put[ting] company

profits before public safety." Pet. App. 30a; Abst. at 127-28. Dr. Levine testified that UP "knows it's going to pay claims every year," and can compute the "expected value" of those claims. Abst. at 132. He explained that "[w]hen you compare the result of that [expected value] calculation with what it would cost you to do the right thing, to fulfill your responsibility ... if it's cheaper not to do the right thing, then that information can go right into the budget process ...." *Id.* at 133. Dr. Levine clearly testified that UP should be condemned for its budgeting practices *nationwide*, far beyond the borders of Arkansas. *See id.* at 127.

4. *Document retention policies.* Plaintiffs also based their claims on alleged spoliation because UP, applying its standard document retention policies, failed to preserve certain records that plaintiffs later sought in discovery. First, UP did not preserve the dispatcher voice tape from the date of the accident.[2] No testimony ever disputed that the tape was recorded over in the routine course of business, seven months before plaintiffs filed their complaint. Second, UP also discarded track inspection records in accordance with its standard document retention policy. UP inspects its track, prepares written reports, and retains them for one year in accordance with FRA regulations. Abst. at 74; 49 C.F.R. § 213.241(b). After the complaint was filed, Patricia Long, a claims representative for UP, sought to obtain the track inspection reports that still existed by sending an email to Don Traylor, the manager of track maintenance. Mr. Traylor, however, did not have custody of the records, did not recall receiving Ms. Long's email, and failed to respond. When Ms. Long followed up with Mr. Traylor and learned that he never had the records, the actual custodian

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[2] UP routinely records conversations between dispatchers and train crews in order to document routing orders. Abst. at 174. These tapes are kept by UP for 90 days, even though the industry standard is to retain them for 30 days and the Federal Railroad Administration ("FRA") does not require that they be recorded or preserved at all. *Id.* at 172.

had already discarded them in accordance with UP's standard policy. Abst. at 66, 73-74. There was no evidence that the custodian had *any* knowledge of the lawsuit or the accident.

Based on this evidence, the trial court issued a spoliation instruction. He told the jury that "you may but are not required to infer that the content of the voice tape and the track inspection records would have been unfavorable to [UP]." Abst. at 188.[3]

The Jury Verdict And Post-Trial Proceedings

The jury returned a general verdict for the plaintiffs in the amount of $5.1 million. Pet. App. at 6a. It also responded in the affirmative to a punitive damages interrogatory which asked whether "Union Pacific acted with malice or in reckless disregard of the consequences." *Id.* The parties stipulated that UP's net worth was $9.6 billion, and "[t]hat figure was written on a board and displayed to the jury." *Id.* The jury returned with a $25 million punitive damages award, five times the amount of compensatory damages. *Id.* at 6a-7a.

UP moved for judgment notwithstanding the verdict or, in the alternative, for a new trial or a remittitur of the

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[3] The spoliation instruction only referenced "voice tapes and track inspection records." Disregarding the record, however, the Arkansas Supreme Court nevertheless found that "there [was] evidence from which a jury would reasonably conclude that Union Pacific attempted to conceal 'slow orders' issued for this portion of track." Pet. App. 32a. The court referenced the testimony of Alan Blackwell, a former UP track inspector. *Id.* at 27a-28a. Blackwell testified that he found slow orders for various periods in 1996—covering the time prior and immediately subsequent to UP's acquisition of this track—but found no work records showing that the problems leading to the 1996 slow orders had been corrected. Abst. at 103-08. Numerous witnesses, including Blackwell, Abst. at 121, testified that they closely examined the track warrants in use at the time of this accident (which was in 1998), and *no* slow order was in effect for that track at that time. Abst. at 54-56, 149, 162, 172. Blackwell also conceded that a federal track inspector had inspected the track after 1996 and rated it safe for travel at 60 miles per hour. Abst. at 122.

punitive damages award, on the grounds that the award violated due process under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Pet. App. at 7a; Brief in Support of Defendant Union Pacific Railroad Company's Motion for Judgment Notwithstanding the Verdict, or in the Alternative for New Trial, or in the Alternative, for Remittitur of Punitive Damages Award at 26-27 (May 24, 2002), Record at 3301-03. *State Farm* had not yet been decided. The trial court denied these motions. Pet. App. at 7a. In an oral ruling, the trial court explained its reasons for upholding the punitive award. First, the court clarified that it had not made any finding as to whether UP had spoliated evidence and emphasized that "I did not send this matter to the jury *on the issue of punitive damages* because of destruction of documents." *Id.* at 48a (emphasis added). Second, the court determined that the "proof presented on the issue of the vegetation" and the proof "concerning policies of the railroad company" was sufficient to support some award of punitives. *Id.* The court also acknowledged that the "slow order" testimony may have factored into the jury's decision on punitives. *Id.* at 47a-48a. Third, the trial court refused to reduce the amount of the award based upon evidence of UP's wealth and a deferential standard of review. The court stated that "I know $25 million is a whole lot of money," but "you also have to look at the net worth of the railroad," which represents "an awful lot of wealth." The court also stated that "I'm not supposed to substitute my finding in place of that of the jury." *Id.* at 48a-49a.

Proceedings On Appeal

UP raised two federal issues in the Arkansas Supreme Court. The court nevertheless affirmed the awards in their entirety.

1. UP argued that the jury's $25 million punitive damages award was unconstitutional under the *Gore/State Farm* guideposts, and further that Dr. Levine's testimony and the reliance on nationwide FRA statistics were exactly

the "practice which the Supreme Court condemned in [*State Farm*]." Abst. at 231-33. The court held that "Union Pacific properly preserved this point for appeal ... and that the award in this case is not excessive." Pet. App. 21a. In scrutinizing the magnitude of the punitive damages award under the Due Process Clause, the Arkansas Supreme Court explained that it was required to "determine whether the amount of punitive damages shocks the conscience of the court" under the three *Gore* guideposts. *Id.* at 31a.

First, the court held that UP's conduct was sufficiently "reprehensible" to justify a substantial punitive award based upon evidence of "several prior near-misses;"[4] evidence that "Union Pacific prioritized monetary gain over the personal safety of those crossing its train tracks;" and, in direct conflict with the trial court's ruling, evidence that UP "intentionally destroyed track records and voice tapes" and "attempted to conceal 'slow orders' issued for this portion of the track." *Id.* at 32a-33a. The court did not address UP's argument that Dr. Levine's "national policy" testimony improperly invited the jury to punish UP for conduct occurring outside of Arkansas (and indeed for the conduct of *other railroads* in the industry). Abst. at 232-33.

Second, the court held that a 5:1 ratio of compensatory to punitive damages was permissible, invoking this Court's statement in *State Farm* that "'[s]ingle-digit multipliers are more likely to comport with due process.'" Pet. App. 33a (alteration in original). It did not acknowledge *State Farm*'s

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[4] The citation to "near-miss" testimony is puzzling in this context because it was undisputed that none of the witnesses who claimed to have seen such events ever notified UP about them. Pet. App. 15a-18a. Indeed, UP moved in limine to exclude entirely such testimony as irrelevant, objected to its admission, and again argued on appeal that the near-miss testimony should have been excluded. The Arkansas Supreme Court acknowledged that "none of the parties could identify the near-miss trains as Union Pacific trains," but held that the near-miss testimony was properly admitted to demonstrate "a dangerous condition" even if it was not relevant to proving "notice of a danger or defect." *Id.* at 17a-18a.

other guidance that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. It instead held that "[t]he standard to be employed is whether the ratio is 'breathtaking.'" Pet. App. 33a.

Third, the court computed the "comparable civil penalties" by adding the maximum theoretically permissible fine under state law ($500 per day) and federal law ($22,000 per day) for failure to control vegetation at a railroad crossing, and then multiplying those fines by the number of days the problem allegedly existed. *Id.* at 33a-36a. This calculation yielded a total analogous penalty of $10 to $11 million, which the court deemed "comparable" to the jury's award of $25 million. *Id.* at 36a. The court made no effort to compare the award to prior punitive awards in other grade crossing cases which plainly revealed the excessiveness of the jury's verdict in this case.[5]

After its brief discussion of the *Gore* guideposts, the Arkansas Supreme Court stated that "[w]e will not substitute our judgment for that of the jury when there is basis in the evidence for the punitive award," and that "[u]nder these circumstances, where the award of punitive damages is appropriate and the net worth of the company is $9.6 billion, we cannot say that a $25 million punishment shocks the conscience."

2. UP also argued that a new trial was required because the trial court permitted the jury to find UP negligent for failure to issue a "slow order," a claim preempted by federal law. Abst. at 222-23. Plaintiffs argued that the theory was

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[5] UP cited *Brown v. Missouri Pacific Railroad*, 703 F.2d 1050 (8th Cir. 1983). In that case, for a similar grade crossing accident in Arkansas, the Eighth Circuit affirmed a punitive damages award of $62,000. To petitioner's knowledge, *Brown* is the largest punitive damages award for a grade crossing accident previously awarded in the state of Arkansas.

not preempted; they did not contest UP's argument that a new trial would be necessary if it was preempted. Brief of Appellee at 9-11 (July 16, 2003). The Arkansas Supreme Court refused to rule on the preemption question, holding *sua sponte* that it must affirm because UP did not challenge *every* theory of negligence presented to the jury. Pet. App. 19a-21a. "When the jury's verdict is rendered on a general verdict form, it is an indivisible entity ...." *Id.* at 19a. "[W]e will neither question nor theorize about the jury's findings." *Id.* "We cannot determine, and we will not speculate, upon which theory the general verdict of negligence was premised. ... Hence, we must affirm." *Id.* at 20a.

In its petition for rehearing, UP argued that a jury verdict that may have rested on a theory preempted by federal law must be set aside, *as a matter of federal law.* Petition for Rehearing at 6-10 (March 15, 2004). UP pointed out that this Court's precedents on the review of general verdicts, stretching back more than a century, uniformly require reversal whenever a legally defective theory is submitted to the jury, and any Arkansas procedural rule that would permit affirmance of a verdict that violates federal law is itself preempted. The Arkansas Supreme Court denied UP's petition without opinion.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to address two issues of great national importance.

1. This Court has recognized for more than a decade that increasingly enormous and arbitrary punitive damages awards threaten the foundations of our legal system, impose costs on the economy and consumers, and are inconsistent with the constitutional guarantee of due process. But this Court's efforts to restrain excessive punitive awards are still being disregarded.[6] Massive punitive awards in routine

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[6] Commentators have noted that *Gore* had virtually no effect on actual punitive awards. *See* Theodore Eisenberg & Martin T. Wells, *The*

tort cases remain common. This Court's intervention is still needed. Four attributes of this case make review especially appropriate to further "illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages." *Gore*, 517 U.S. at 568 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994)).

First, this case involves unintentional conduct that falls, at most, at the low end of the reprehensibility spectrum. All of this Court's prior cases have involved intentional misconduct, leaving the lower courts with little guidance as to the constitutional limits on punitive awards in negligence cases. Although this Court observed in *State Farm* that where reprehensibility is low and compensatory damages are substantial, a 1:1 ratio "can reach the outermost limit of the due process guarantee," 538 U.S. at 425, courts have repeatedly declined to read this statement as a holding. On the facts presented here, *State Farm*'s critically important guidance can be transformed into a square holding that cannot be so easily disregarded.

Second, this case presents the opportunity to further clarify important limits on the nature of the evidence that can properly be used to support findings of aggravated reprehensibility. *State Farm* held that punitive awards may not be based on out-of-state conduct that was lawful where it occurred. This case should be used to clarify that state law punitive awards also may not be based on safety practices that conform to preemptive *federal* standards, on national corporate "policies" that value profits, or on alleged litigation misconduct that has nothing to do with the plaintiff's injury.

Predictability of Punitive Damages Awards in Published Opinions, The Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced, 7 Sup. Ct. Econ. Rev. 59, 61 (1999). *State Farm* has fared little better. *See infra* n.8.

Third, review is warranted here to clarify the application of the third *Gore* guidepost and to resolve a conflict with the Eleventh Circuit. The Arkansas Supreme Court held that this punitive award was consistent with due process, in part, because it was only 2.5 times the maximum possible cumulative fines that could be imposed under other state and federal law, never considering whether fines of that magnitude are ever imposed. In contrast, the Eleventh Circuit has held that fines *actually imposed* provide the appropriate comparison—not hypothetical maximums. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337 (11th Cir.), *cert. denied*, 528 U.S. 931 (1999). This Court should not permit reviewing courts to eviscerate this objective benchmark of fairness by disregarding the actual policies of the regulatory agency charged with responsibility for rail safety. Here, FRA imposed *no* fine for the conduct at issue and the jury's award was more than five times the total fines collected by FRA *for all U.S. non-hazardous materials violations for all railroads during the entire year following this accident. See infra* at 25.

Fourth, review is warranted here to resolve widespread confusion among the lower courts about the proper standard of review of punitive awards, and to resolve a conflict with the Ninth Circuit. This Court has explained that the excessiveness issue is a question of constitutional law. But the Arkansas Supreme Court, like many lower courts, instead treated it as a question of sufficiency of the evidence—stating that it "will not substitute [its] judgment for that of the jury when there is basis in the evidence for the punitive award." Pet. App. 36a. In contrast, the Ninth Circuit has held that, under this Court's decision in *Oberg*, "[t]he test of whether a punitive damages award survives review cannot be merely whether there is any evidence to support it." *In re Exxon Valdez*, 270 F.3d 1215, 1240 (9th Cir. 2001).

2. This Court should also grant review to resolve an important question of federal preemption. The trial court permitted plaintiffs to argue to the jury that UP was negligent because it failed voluntarily to reduce operating speeds over this stretch of track—which of course is simply another way of saying that the speed limit was too high. This Court has already held that federal law preempts all state negligence claims based on train speed. *Easterwood*, 507 U.S. at 675. Yet the Arkansas Supreme Court held that it need not order a new trial because the jury *might have* rested its verdict on another, non-preempted, theory of negligence. This Court has held, consistently and for more than a century, that a verdict must be reversed if any of the theories submitted to the jury were legally defective. Arkansas's contrary rule insulates jury verdicts that violate federal law from judicial review, and will seriously frustrate the federal interest in uniform rail safety regulation.

I. THIS COURT SHOULD GRANT REVIEW TO PROVIDE GUIDANCE ON THE STANDARDS FOR EVALUATING PUNITIVE AWARDS

A. A 1:1 Ratio Should Be The Presumptive Limit When Compensatory Damages Are Substantial

This Court explained in *State Farm* that a 4:1 ratio of punitive to compensatory damages is ordinarily "close to the line of constitutional impropriety," consistent with our legal system's long tradition of using "sanctions of double, treble, or quadruple damages to deter and punish." 538 U.S. at 425. Higher ratios might be justifiable "where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id.* (quoting *Gore*, 517 U.S. at 582). But by the same token, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

This case affords an exceptional opportunity to clarify the application of *Gore*'s "ratio" guidepost, because the conduct at issue here—even viewed in its worst light—was barely more culpable than simple negligence. Punitive damages are commonly imposed in negligence cases when the jury, as here, finds that the defendant acted with "reckless disregard" of a known risk. Pet. App. 6a. But the lower courts have remarkably little guidance about the constitutional limits of punitive awards in negligence cases—beyond this Court's bare statement that "intentional malice, trickery, or deceit" is more reprehensible than "mere accident." *State Farm*, 538 U.S. at 419.

The Arkansas Supreme Court allied itself in this case with the growing body of lower courts that have essentially ignored this Court's guidance that ratios over 4:1 require extraordinary justification, and that 1:1 will frequently be "the outermost limit" when compensatory damages are substantial. Indeed, the court's opinion writes the 1:1 category out of the law entirely. The compensatory damages awarded in this case were unquestionably "substantial." *See id.* at 426 ($1 million is "substantial"). And UP's conduct, however characterized, was barely "reprehensible" enough to justify any constitutional award of punitive damages at all.[7] If a 1:1 ratio is not "the

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[7] The conduct at issue here would not warrant punitive damages at all under the law of many states. *See, e.g., Ill. Cent. R.R. Co. v. Hawkins*, 830 So. 2d 1162, 1172-73 (Miss. 2002) (vacating punitive damages in grade crossing accident with three fatalities, where plaintiff showed that uncut vegetation so obstructed visibility as to give motorists a four-second window in which to avoid collisions, and that "in an attempt to cut costs ICR was willing to risk the lives of motorists," because such showing did not demonstrate "willful, egregious behavior" as required by state law); *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 247-49 (Mo. 2001) (vacating punitive damages in grade crossing accident, where plaintiff introduced "near miss" testimony, and showed that uncut vegetation created an extreme visibility safety hazard, because such showing did not demonstrate indifference or disregard that was "tantamount to intentional wrongdoing").

outermost limit" in a negligence case with a simple recklessness finding and compensatory damages in the multiple millions of dollars, then it never is. Yet the Arkansas Supreme Court authorized a punitive award five times the compensatory damages, crossing even the 4:1 line that this Court has repeatedly described as "close to the line" of "constitutional impropriety" for *any* case. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991); *see also Gore*, 517 U.S. at 581; *State Farm*, 538 U.S. at 425.

Out of the 31 cases since *State Farm* (not counting this one) in which compensatory damages exceeded $200,000 and the jury awarded punitive damages resulting in a ratio over 1:1, only one reviewing court has understood *State Farm* to require a reduction to 1:1.[8] Ratios of 9:1 and higher remain

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[8] *Compare Hangarter v. Provident Life & Accident Ins. Co.*, No. 02-17423, 2004 WL 1418017 (9th Cir. June 25, 2004) ($5 million punitives vs. $2.6 million compensatories); *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824 (8th Cir. 2004) ($10 million punitives vs. $2.1 million compensatories); *Greenberg v. Paul Revere Life Ins. Co.*, 91 Fed. Appx. 539 (9th Cir. 2004) (en banc) ($2.4 million punitives vs. $540,000 compensatories); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003) ($50 million punitives vs. $15 million compensatories), *cert. denied*, 124 S. Ct. 1423 (2004); *Zhang Wei v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) ($2.6 million punitives vs. $360,000 compensatories, reasoning that "no Supreme Court or Ninth Circuit case disapprov[es] of a single-digit ratio"), *cert. denied*, 124 S. Ct. 1602 (2004); *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003) ($2 million punitives vs. $500,000 compensatories), *cert. denied*, 124 S. Ct. 1168 (2004); *In re Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004) (reducing punitive award from $5 billion to $4.5 billion exclusively because Ninth Circuit remand order explicitly demanded a reduction, despite compensatories of $513 million); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 300 F. Supp. 2d 1055 (D. Or. 2004) ($16.7 million punitives vs. $526,336.14 compensatories, for a ratio of 32:1); *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, 298 F. Supp. 2d 746 (N.D. Ill. 2004) ($27.7 million punitives vs. $8.3 million compensatories); *S. Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090, 1098-99 (D. Ariz. 2003) (because "Supreme Court's holding on ratios ... is not categorical," $60 million punitives are constitutionally permissible where compensatories are $390,072.58, for a ratio of 153:1);

McClain v. Metabolife Int'l, Inc., 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003) (approving, *inter alia*, $1 million punitives vs. $500,000 compensatories on assumption that "a multiplier of 9 or less means that the punitive damages presumptively pass[] muster"); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark.) ($21 million punitives vs. $5 million compensatories), *cert. denied*, 124 S. Ct. 532 *and cert. denied*, 124 S. Ct. 535 (2003); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29 (Cal. Ct. App.) ($9 million punitives vs. $1.5 million compensatories), *rev. granted sub nom. Henly v. Philip Morris USA, Inc.*, 88 P.3d 497 (Cal. 2004); *Maya B. v. Vogel*, No. B150299, 2004 WL 551325 (Cal. Ct. App. Mar. 22, 2004) ($1.6 million punitives vs. $790,000 compensatories); *Simon v. San Paolo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367 (Cal. Ct. App. 2003) ($1.7 million punitives vs. $405,000 compensatories), *rev. granted*, 86 P.3d 881 (Cal. 2004); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736 (Cal. Ct. App. 2003) ($1 million punitives vs. $258,570 compensatories); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos.*, No. G029532, 2003 WL 21224088 (Cal. Ct. App. May 28, 2003) ($1 million punitives vs. $293,000 compensatories); *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003) ($23.7 million punitives vs. $4.6 million compensatories); *Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903 (Mass. App. Ct. 2003) ($1.4 million aggregate punitives vs. $424,000 aggregate compensatories); *Honzawa v. Honzawa*, 766 N.Y.S.2d 29 (N.Y. App. Div. 2003) (vacating reduction of punitives to $10 million, and setting punitives instead at $15 million, on compensatories of $11 million); *Gallegos v. Elite Model Mgmt. Corp.*, Index No. 120577/00, 2004 WL 51604 (N.Y. Sup. Ct. Jan. 6, 2004) ($2.6 million punitives vs. $1.1 million compensatories); *Williams v. Philip Morris Inc.*, Nos. 9705-03957; A106791, 2004 WL 1259675 (Or. Ct. App. June 9, 2004) ($79.5 million punitives vs. $821,485 compensatories, for a ratio of 100:1); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669 (Or. Ct. App. 2003) ($3.5 million punitives vs. $500,000 compensatories); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409 (Pa. Super. Ct. 2004) (citing *State Farm*'s 1:1 guidance, yet nevertheless affirming $2.8 million in punitives vs. $278,825 in compensatories); *Reading Radio, Inc. v. Fink*, 833 A.2d 199 (Pa. Super. Ct. 2003) ($805,000 punitives vs. $300,000 compensatories); *Austin v. Specialty Transp. Servs., Inc.*, 594 S.E.2d 867 (S.C. Ct. App. 2004) ($2.1 million punitives vs. $850,000 compensatories); *Haggar Clothing Co. v. Hernandez*, No. 13-01-009-CV, 2003 WL 21982181 (Tex. App. Aug. 21, 2003) ($1.4 million punitives vs. $210,000 compensatories); *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064 (Utah 2003) ($5.5 million punitives vs. $1 million compensatories), *cert. denied*, 124 S. Ct. 1716 (2004); *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2004 UT 34, 2004 WL 869188 (Utah Apr. 23, 2004) (on remand from this Court, setting punitives at $9 million vs. compensatories of $1 million, despite explicit contrary

routine. Indeed, on remand in *State Farm* itself the Utah Supreme Court recently defied this Court's explicit warning that "[a]n application of the *Gore* guideposts to the facts of this case ... likely would justify a punitive damages award *at or near the amount of compensatory damages*," 538 U.S. at 428 (emphasis added), by instead approving a 9:1 ratio. *Campbell v. State Farm*, No. 981564, 2004 UT 34, 2004 WL 869188, at *2-3, *10 (Utah Apr. 23, 2004). And just two weeks ago the Ninth Circuit announced that "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, No. 02-17423, 2004 WL 1418017, at *11 (9th Cir. June 25, 2004). This Court should grant review to clarify that a 1:1 ratio is presumptively the due Process limit in cases where, as here, compensatory damages are substantial (and no intentional misconduct was proven).

B. Further Guidance Is Needed On The Nature Of The Evidence That Can Support Findings Of Reprehensibility

In *State Farm*, this Court held that punitive awards may be imposed only for conduct that is within the state's regulatory jurisdiction and closely related to "the acts upon which liability was premised." 538 U.S. at 422. The Arkansas Supreme Court violated those principles in several commonly recurring ways that can be curbed only through guidance from this Court.

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instruction in remand order); *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789 (Wis.) ($3.5 million punitives vs. $490,000 compensatories), *cert. denied*, 124 S. Ct. 925 (2003), *with TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) (reducing punitives to close to a 1:1 ratio, in reliance on *State Farm*). *But see also Sufix U.S.A., Inc. v. Cook*, 128 S.W.3d 838, 842 & n.7 (Ky. Ct. App. 2004) (affirming $3 million punitive award on compensatories of $2.8 million, citing *State Farm*'s 1:1 ratio discussion).

Nationwide And Industry-Wide Conduct. This Court held in *State Farm* that permitting a state to punish defendants for conduct that is in fact governed by the law of another state would "'throw[] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.'" 538 U.S. at 421 (quoting *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914)). The plaintiffs in *State Farm* argued that out-of-state misconduct "was not the primary basis for the punitive damages award." *Id.* at 422. This Court nonetheless held that it required reversal, at least in the absence of a cautionary instruction.

The Arkansas Supreme Court committed precisely the same type of error that this Court reversed in *State Farm*: it allowed this case to be "used as a platform to expose, and punish, the perceived deficiencies of [UP's] operations throughout the country." *Id.* at 420. In concluding that UP's conduct was sufficiently "reprehensible" to justify a substantial punitive award, the court relied heavily on Dr. Levine's speculation that UP has a nationwide "policy" of prioritizing profits over safety. Pet. App. 31a-33a. Dr. Levine based that testimony on a review of UP's nationwide public filings, and on positions UP took as part of a national organization of railroads. Abst. at 126-27.

Indeed, plaintiffs invited the jury to punish UP for the conduct of *other railroads*. Dr. Levine testified in large part about general railroad industry policies.[9] And plaintiffs told the jury that FRA statistics showed "that people were dying in Arkansas more often than any state in the United States at grade crossings, Number One." Abst. at 42. Those

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[9] *See* Abst. at 134 ("When the industry-wide positions were taken in regard to railroad responsibility for grade crossing safety, Union Pacific was one of those that supported those positions."); *id.* at 136 ("I criticize all of the railroads for not spending enough money on grade crossing safety.").

FRA statistics included all accidents at all crossings involving all trains operating in Arkansas—including trains owned and operated by BNSF, Kansas City Southern or various short-line railroads, across track not owned by Union Pacific. This case therefore stampeded right past this Court's admonition against punishing defendants "for being an unsavory ... business," 538 U.S. at 423, and actually punished UP for being associated with an allegedly unsavory industry. *See also id.* at 418 ("Our concerns are heightened when the decisionmaker is presented ... with evidence that has little bearing as to the amount of punitive damages that should be awarded.").

"Expert" testimony like Dr. Levine's is a common and increasingly significant end-run around this Court's limitations on excessive punitive awards. The formula is simple: an accident occurred; the defendant earned profits last year that could have been spent on additional accident avoidance measures; therefore the defendant cares more about profits than people. Q.E.D. Such reasoning makes a mockery of this Court's insistence that substantial punitive awards may only be imposed for genuinely reprehensible acts within the jurisdiction of the state. The formula will justify a substantial punitive award in essentially every case against a corporation in those essential industries—from transportation, to heavy manufacturing, to pharmaceuticals —in which a zero accident rate cannot be achieved at a realistic or justifiable cost. (There were, for example, 2909 grade crossing accidents nationwide in 2003. *See* U.S. Dep't of Transp., Rep. No. MH-2004-065, *Audit of the Highway-Rail Grade Crossing Safety Program* 2 (June 16, 2004)).

Preempted Conduct. The Arkansas Supreme Court also contravened *State Farm*'s principles by upholding a punitive award based in part on conduct that is exclusively governed by *federal* law. The Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 *et seq.*, was enacted to ensure that all "laws, regulations, and orders" relating to railroad

safety "shall be nationally uniform to the extent practicable." 49 U.S.C. §§ 20103(a), 20106. FRA has promulgated comprehensive federal regulations that reflect its expert judgment about how scarce safety resources should be allocated. Those regulations preempt state law, including state tort law, on any subject they cover.

This Court made abundantly clear in *Easterwood* that "for projects in which federal funds participate in the installation of warning devices" at grade crossings, FRA regulations cover the subject matter and preempt any state law that "seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." 507 U.S. at 671; *see also Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 354 (2000) ("[O]nce the FHWA has funded the crossing improvement and the warning devices are actually installed and operating," even where those devices consist of nothing more than a sign, state negligence law is preempted). Notwithstanding the FRSA and this Court's rulings, Dr. Levine was permitted to opine in this case that railroads "have some responsibility for every crossing, even the ones that are funded by the public." Abst. at 130. The thrust of his testimony was that the federal program for grade crossing safety is inadequate, and the railroads are not fulfilling their (presumably state law) responsibility to provide automated crossings, "gates, lights, flashing lights and gates," etc. *Id.* at 128. That judgment directly conflicts with federal policy. There are more than 150,000 railroad grade crossings nationwide and FRA has made the judgment that it does not make economic sense to install automatic gates and flashing lights at every one. FRA has explained that allowing grade crossing policy to be set by state juries would produce "misallocation of scarce resources," emphasizing improvements "not where research and data indicates they will do the most good, but where a judge or jury determined, after the fact, that such a system should have been installed." *Selection and Installation of*

Grade Crossing Warning Systems, Notice of Proposed Rulemaking, 60 Fed. Reg. 11,649, 11,651 (Mar. 2, 1995).

Plaintiffs were also allowed to present hours of evidence and argument to the effect that UP was negligent for not issuing a "slow order" reducing operating speeds on this track (Abst. at 86-93, 101-12), despite the testimony of the federal track inspector that he had inspected the track and had rated it for safe travel at 60 miles per hour (Add. at 356, 420-21). The trial court recognized that plaintiff's claim about slow orders likely infected the jury's punitive award. Abst. at 207. But any theory that UP was negligent for failing to issue a "slow order" is a claim of "excessive speed," and therefore squarely preempted by the FRSA and the judgment of the FRA inspector. *See Easterwood*, 507 U.S. at 675.[10] If local rail safety officials cannot second-guess the judgment of a federal track inspector by imposing speeds lower than the federal limit, then juries may not do so under the guise of state negligence law. *Id.*

The Arkansas Supreme Court erred in upholding a punitive award that was based in part on preempted claims. Just like the nationwide conduct that this Court held to be beyond Utah's purview in *State Farm*, Arkansas simply has no authority to impose punitive damages based on preempted allegations about the speed of trains or the adequacy of federally funded crossing signals.

Unrelated Litigation Misconduct. Litigation misconduct such as spoliation of evidence is a "dissimilar act[], independent from the acts upon which liability was premised" and therefore cannot serve as a basis for punitive damages. *State Farm*, 538 U.S. at 422. Nonetheless, the Arkansas Supreme Court relied heavily on its conclusion that UP spoliated evidence in affirming this award,

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[10] *See also St. Louis Southwestern Ry. Co. v. Pierce*, 68 F.3d 276, 278 (8th Cir. 1995) (holding, and collecting cases that hold, that claims of negligent failure to issue or follow a slow order are preempted).

transforming the absence of evidence into direct evidence of reprehensibility at the time of the accident. The court suggested that the discarded track records and voice tape might have "contained remarks about the near misses testified to at trial and the dangerous condition presented by the overgrown vegetation." Pet. App. 28a.

That is blind speculation, not the "[e]xacting appellate review" that this Court has deemed necessary to "ensure[] that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'"[11] The Arkansas Supreme Court recognizes that the content of spoliated evidence is unknowable. It has refused to create an independent tort of spoliation because it would require impermissible speculation. *See Goff v. Harold Ives Trucking Co.*, 27 S.W.3d 387, 390-91 (Ark. 2000). Many courts have reached the same conclusion.[12] The use of such speculation

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[11] *State Farm*, 538 U.S. at 418 (citations omitted). The dispatch tape was rerecorded, under UP's standard recycling policy, months before this suit was even filed. Any tapes that might have reflected "the near misses testified to at trial," would have been recorded over well before this accident occurred, when UP unquestionably had no duty to preserve the tapes. Moreover, since plaintiffs only requested the tape for a two-and-a-half hour period surrounding the accident, *see* Request for Production of Documents No. 4 (Oct. 19, 1998), the court's speculation about reference to near misses or vegetation is a wild guess. Track inspection records contain only a track inspector's notations about the condition of the track itself (Abst. at 65), not general observations about the vegetation at grade crossings. The trial court recognized that no reasonable jury could conclude that these materials contained evidence of reprehensible conduct; it expressly held that he "did not send this matter to the jury on the issue of punitive damages because of destruction of documents," but rather on the vegetation and other issues. Pet. App. 48a. And the allegation that slow orders were spoliated, *see id.* at 32a, is immaterial as a matter of law. As documented in Part I.B *supra*, all speed issues were preempted.

[12] For example, in *Cedars-Sinai Medical Center v. Superior Court*, 954 P.2d 511, 518 (Cal. 1998), the Supreme Court of California rejected the tort of spoliation (overturning in the process California Court of Appeals cases that had pioneered the spoliation tort), reasoning, *inter alia*, that "it is impossible to know what the destroyed evidence would have

to supply otherwise absent "reprehensibility" under *State Farm* would create a massive and essentially unreviewable loophole, since some records will have been lost or destroyed in almost any litigation. If an otherwise unremarkable case can support massive punitive damages based on speculation about spoliated evidence alone, plaintiffs lawyers will have a strong incentive to find spoliation issues in every case.[13]

Nor did UP have even the merest scintilla of notice that its failure to preserve records might result in a $25 million punitive damages award. Courts rarely, if ever, permit a monetary penalty for spoliation of evidence. The overwhelming majority of spoliation cases begin and end with a jury instruction permitting an adverse inference as was given here. UP was punished twice for spoliation—once by the adverse inference instruction and again by

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shown... It would seem to be sheer guesswork ...."' (Citation omitted) (first ellipses in original). *See also Meyn v. Iowa*, 594 N.W.2d 31, 34 (Iowa 1999) (same); *Dowdle Butane Gas Co. v. Moore*, 831 So. 2d 1124, 1135 (Miss. 2002) (approving *Goff* and reasoning that "uncertainty of the fact of harm" warrants rejecting the spoliation tort); *Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex. 1998) (noting that even courts that do recognize the spoliation tort recognize "that damages are speculative").

[13] The Arkansas Supreme Court may have been led astray by language in *State Farm* suggesting that the company's conduct "merits no praise" in part because its "employees altered the company's records to make Campbell appear less culpable." 538 U.S. at 419. That conduct was actually part of the underlying bad faith tort, not later litigation misconduct; State Farm altered those documents as part of its scheme to induce Campbell to proceed to trial instead of settling. Because that conduct was not "independent of the acts upon which liability was premised," it was relevant to the reprehensibility calculus. But there was also true litigation misconduct in *State Farm*, and this Court's treatment of *that* issue indicates that such matters may not be used to justify a punitive award. As Justice Ginsberg's dissent makes abundantly clear, State Farm *intentionally* spoliated evidence. *See* 538 U.S. at 434 (Ginsberg, J. dissenting) ("State Farm made 'systematic' efforts to destroy internal company documents that might reveal its scheme ... efforts that directly affected the Campbells."). This Court's opinion pointedly ignored that issue, stressing that punitives could be imposed only for "the conduct that harmed the plaintiff." 538 U.S. at 422-23.

punitive damages. Petitioner has been unable to identify *any* case in which a state supreme court or federal court of appeals has sanctioned a monetary award for spoliation that even approaches the magnitude of the punitive damages in this case.[14] And the Eighth Circuit recently remanded a $164,410.25 attorneys' fee award granted as a sanction for almost identical spoliation allegations because some of that figure might have been based on destruction of records before the litigation was filed. *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 751 (8th Cir. 2004). Of course it is undisputed that the dispatch tape in this case was recorded over long before any litigation was filed.

C. The Arkansas Supreme Court's Interpretation Of The Third Guidepost Conflicts With The Standard Applied In The Eleventh Circuit

The Arkansas Supreme Court held that this award passes review under the third *Gore* guidepost because "the total civil penalties authorized by law are comparable to the punitive damages award set by the jury in this case." Pet. App. 36a. The court added together the maximum possible state fine ($500 per day) and federal fine ($22,000 per day) for overgrown vegetation, treated every day as a separate violation, and arrived at an estimate of $10-$11 million in civil penalties. Of course, the punitive award affirmed by the court was more than double that estimate. But more importantly, the court's analysis is untethered from the purpose of making such comparisons: to ascertain whether

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[14] Monetary penalties for spoliation rarely exceed $250,000. The largest monetary penalty Petitioner has been able to locate was a $3 million award of punitive damages, remitted by the Supreme Court of Ohio to $1 million. *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331 (Ohio), *cert. denied*, 513 U.S. 1059 (1994). The spoliation at issue in *Moskovitz* was orders of magnitude more reprehensible than the destruction of records in this case: in a medical malpractice case, the doctor literally whited out notations on a patient's chart, and then claimed at trial to have seen no evidence of cancer until well after a critical period. *Id.* at 336-37.

the defendant had fair notice that it might be subjected to an award of this magnitude. To that end, the relevant comparison is to the penalties actually imposed for similar misconduct, not the theoretical maximum.

The Eleventh Circuit confronted this issue in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), and rejected plaintiffs' suggestion that the proper comparison was to the $100,000 per day maximum fine authorized by Georgia law for stream pollution. The court properly recognized that "it cannot be presumed that the defendant had notice that the state's interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute." *Id.* at 1337. "[I]f the defendant had emptied a bottle of soda pop into a Georgia stream, it cannot reasonably be said that he was on notice he could be fined [the statutory maximum] $100,000." *Id.* The court looked instead to the actual fine imposed by Georgia as the best "indication of the 'legislative judgment' as to the 'appropriate sanctions for the conduct at issue.'" *Id.* (quoting *Gore*, 517 U.S. at 583).

The punitive award affirmed in this case is wildly disproportionate to the fines actually imposed by FRA for vegetation and other track maintenance violations. The *total* fines collected by FRA from all railroads in America for all safety violations (excluding hazardous materials)[15] for the year following this accident were $4.2 million, less than one-fifth of the punitive damages award in this case for allegedly overgrown vegetation at a single crossing. *See* Federal Railroad Administration, Office of Chief Counsel, *Railroad Safety Civil Penalty Cases Closed During Fiscal Year 1999* (Jan. 31, 2000). The FRA's fines actually imposed

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[15] FRA routinely reports hazardous materials (HMT) fines separately from all other rail safety fines, because while other safety fines are imposed exclusively upon railroads, HMT fines can be imposed against shippers as well.

thus gave UP no warning that it was exposed to $25 million in potential penalties.

D. The Arkansas Supreme Court Applied An Unconstitutionally Deferential Standard of Review In Conflict With The Ninth Circuit

When evaluating whether the jury's punitive award was unconstitutionally excessive, the Arkansas Supreme Court applied the same highly deferential standard of review it would apply to a motion to set aside a jury verdict on liability and grant a new trial. After discussing the *Gore* guideposts, the court held that it "will not substitute our judgment for that of the jury when there is basis in the evidence for the punitive award." Pet. App. 36a.

Footnotes in several of this Court's recent opinions do suggest that "specific findings of fact" are entitled to some deference in the due process analysis.[16] The lower courts are deeply confused about how to implement that deference in practice.[17] But however underlying facts are treated, one

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[16] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 & n.14 (2001); *see also id.* at 431 n.4; *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994).

[17] This Court has suggested, for example, that "[t]he factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous." *Bajakajian*, 524 U.S. at 336 n.10. Implementing that guidance is straightforward in a bench trial. But if the trial court has itself deferred to findings of fact by the jury under traditional "sufficiency of the evidence" review, it is not clear that the *court* has made "findings" of any kind. It has merely concluded that the evidence was sufficient to permit a reasonable jury to reach a particular conclusion—which is actually a question of law, ordinarily reviewed *de novo*. *See, e.g., United States v. Overholt*, 307 F.3d 1231, 1249 (10th Cir. 2002). The lower courts are in disarray on this issue, with some appellate courts deferring to the jury and others to comments made by the trial court in the course of its own excessiveness review.

Another related problem is what qualifies as a "specific finding[] of fact" entitled to deference under *Cooper Industries*, 532 U.S. at 440 n.14. Presumably any facts explicitly found by the jury on a special verdict form qualify for deference, as do facts necessarily implied by the jury's

thing ought to be clear: "the level of punitive damages is not really a 'fact' 'tried' by the jury" at all, and is therefore not entitled to deference of any kind. *Cooper Indus.*, 532 U.S. at 437. The Arkansas Supreme Court clearly erred by holding that it would not "substitute [its] judgment for that of the jury when there is basis in the evidence for the punitive award." Pet. App. 36a.

The standard of review adopted by the Arkansas Supreme Court also conflicts with the settled law of the Ninth Circuit. In *In re Exxon Valdez*, 270 F.3d at 1238, the Ninth Circuit noted that "[o]rdinarily appellate courts must defer to juries," and that "[i]f a reasonable mind could reach the result the jury reached on the evidence before them, that is ordinarily the end of it." The jury's $5 billion award in *Exxon Valdez* would have survived that kind of review: "This was a very bad oil spill ... and the jury may well have decided that for such egregious conduct the company responsible ought to have a year without profit." *Id.* at 1238-39. The court recognized, however, that "a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards." *Id.* at 1239. Therefore "[t]he test of whether a punitive damages award survives review cannot be merely whether there is any evidence to support it ...." *Id.* at 1240. The Ninth Circuit went on to apply the *Gore* guideposts, and held that the award was unconstitutionally excessive. This

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verdict on liability or its finding authorizing punitive damages. But in the punitive damages phase itself, the jury generally just returns a number. It is not possible to glean from that number which of the (often many) allegations of reprehensible conduct the jury actually accepted. Indeed, the jury might have concluded that the defendant's conduct was barely reprehensible at all, but that its wealth necessitated a substantial award. Nonetheless many courts (including the Arkansas Supreme Court here) claim to "defer" to the jury by simply adopting the most egregious view of the defendant's conduct, on every issue, that the evidence could possibly support. Others (particularly the Ninth Circuit, as discussed in the text) undertake a more realistic and independent review of the evidence.

award cannot withstand scrutiny under that standard of review.

II. THE ARKANSAS SUPREME COURT'S VIOLATION OF THE SUPREMACY CLAUSE ALSO WARRANTS REVIEW

The trial court clearly erred in holding that plaintiffs' "excessive-speed claim" was preempted but that "their claim of negligent failure to issue a 'slow order'" was not.[18] But the Arkansas Supreme Court refused to review that error on the ground that the jury *might have* imposed liability for one of the other theories of negligence plaintiffs relied upon.[19] "[B]ecause we conclude that there was sufficient evidence of negligence, we are unwilling to speculate upon which theory of negligence the jury premised its verdict." Pet. App. 21a. That state rule of appellate review is inconsistent with this Court's precedents, frustrates Congress's declared purpose of uniformity in rail safety regulation, and must be set aside.

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[18] Pet. App. 5a. In their response to UP's Petition for Rehearing, plaintiffs asserted that no slow order claim was submitted. *See* Appellees/Plaintiffs' Brief Opposing the Petition for Rehearing at 1-2 (Mar. 27, 2004). But the trial court recognized that "the jury had an opportunity to consider whether or not the railroad may have ignored some slow orders." Abst. at 207. The Arkansas Supreme Court recognized that plaintiffs' amended complaint alleged that Union Pacific "failed to issue a 'slow order,'" Pet. App. 4a, and that the trial court denied UP's in limine and directed verdict motions as to the "claim of negligent failure to issue a 'slow order.'" *Id.* at 5a. The jury heard voluminous evidence on this issue. Abst. at 86-93, 100-123.

[19] The Arkansas Supreme Court used "sufficiency of the evidence" language, but clearly understood that UP's argument was in fact federal preemption. *See* Pet. App. 2a-5a (noting that UP raised an affirmative defense of federal preemption against "the Barbers' claims on track maintenance and 'slow orders'); *id.* at 5a (noting that the trial court granted UP's "motion in limine as to the Barbers' excessive-speed claims on grounds of federal preemption, but denied the motion as to their claim of negligent failure to issue a 'slow order'").

This Court has held consistently for 120 years that a general jury verdict must be reversed if *any* theory submitted to the jury was predicated on an error of federal law. *See Maryland v. Baldwin*, 112 U.S. 490 (1884); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 497-98 (1980). And a state rule of decision cannot control when it operates to defeat a properly asserted federal right. As this Court explained in *Felder v. Casey*, 487 U.S. 131 (1988), a "'federal right cannot be defeated by the forms of local practice.'" *Id.* at 138 (quoting *Brown v. W. Ry. Co. of Ala.*, 338 U.S. 294, 296 (1949)). Felder sued police officers under 42 U.S.C. § 1983, but the Wisconsin Supreme Court dismissed his case for failure to comply with the state's notice-of-claim statute. *Id.* at 136-38. This Court held that Wisconsin's rule of practice frustrated the remedial purpose of Section 1983, and was therefore preempted. The Court stressed that "actions brought in state court w[ould] frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts." *Id.* at 141. This Court has reaffirmed many times that states cannot adopt outcome-determinative rules of practice that frustrate the assertion of federal rights.[20] Standards of appellate review are no exception.

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[20] *See Johnson v. Fankell*, 520 U.S. 911, 920 (1997) ("One of the *primary grounds* for our decision [in *Felder*] was '[the chance of] different outcomes' depending on whether § 1983 claims were brought in state or federal court ...."); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (state may not apply state rule of practice to find that railroad executive waived jurisdictional defenses conferred by federal law); *Brady v. S. Ry. Co.*, 320 U.S. 476, 479 (1943) (state may not apply state rule for reviewing sufficiency of the evidence in FELA case); *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 299 (1949) (federal law controls pleading standards, because otherwise "desirable uniformity in the adjudication of federally created

This Court held in *Chapman v. California*, 386 U.S. 18 (1967), for example, that the "harmless error" standard for review of criminal convictions involving potential constitutional violations is governed by federal law, even in state court. "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Id.* at 21.

Because the federal rule would require reversal when it is impossible to know whether the jury based its verdict on preempted grounds, this case presents exactly the circumstance that *Felder* and *Chapman* forbid. The Arkansas rule shelters from review jury verdicts that violate federal law, and guarantees that lawsuits involving preemption claims "will frequently and predictably produce different outcomes ... based solely on whether that litigation takes place in state or federal court." *Felder*, 487 U.S. at 141. That result has broad implications for the administration of justice, and will plainly frustrate the federal interest in uniform rail safety policy.[21]

CONCLUSION

For the reasons explained above, the petition for certiorari should be granted, and the decision of the Arkansas Supreme Court should be subjected to plenary review or summarily reversed.

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rights could not be achieved"); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 360 (1952) (federal practice controls which issues are for judge and which are for jury in FELA case); *Bowman v. Ill. Cent. R.R. Co.*, 142 N.E.2d 104, 115 (Ill.) (federal law governs standard of review of jury verdicts in FELA cases), *cert. denied*, 355 U.S. 837 (1957).

[21] If this Court has any doubt that the complex and significant issues of federal rail policy raised by this case warrant certiorari, Petitioner respectfully suggests that this Court request the views of the Solicitor General.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF ARKANSAS

No. 03-57

UNION PACIFIC RAILROAD COMPANY, APPELLANT	Opinion Delivered
VS.	APPEAL FROM THE ST. FRANCIS COUNTY CIRCUIT COURT NO. CIV-98-312
CHRIS BARBER and CLAUDETTE BARBER, ALLIED WASTE INDUSTRIES, INC., APPELLEES	HON. HARVEY L. YATES, JUDGE
	AFFIRMED.

FEBRUARY 26, 2004, OPINION DELIVERED.

JUDGES: ANNABELLE CLINTON IMBER, Associate Justice. DICKEY, C.J., and THORNTON, J., dissent.

OPINION

ANNABELLE CLINTON IMBER, Associate Justice.

This case arises from a collision between a train owned and operated by Appellant Union Pacific Railroad Company (Union Pacific) and a garbage truck occupied by Appellee Chris Barber. A jury returned a verdict that found Union Pacific negligent and awarded Mr. Barber and his wife $ 5.1 million in compensatory damages. In addition, the jury concluded that Union Pacific acted with malice or reckless disregard and awarded the Barbers $25 million in punitive damages. We affirm the judgment.

At about 9:15 a.m, on January 19, 1998, a garbage truck owned by Browning-Ferris, Inc., was struck in St. Francis County by one of Union Pacific's freight trains. The

garbage truck was traveling north over the railroad crossing as the train was traveling eastbound on the track. At the time of the accident, Charles Rolfe was driving the garbage truck while appellee Chris Barber sat in the passenger seat. The train struck the rear portion of the garbage truck on the driver's side, killing Mr. Rolfe and injuring Mr. Barber.

On October 19, 1998, Mr. Barber and his wife, Claudette Barber (hereinafter "the Barbers"), filed a complaint against Union Pacific Railroad Company, L.E. Piper, Jr., the train engineer at the time of the accident (hereinafter referred to collectively as "Union Pacific"), and Asplundh Brush Control Company. The complaint alleged that the accident was caused by Union Pacific's failure to control vegetation within its right-of-way in violation of Ark. Code Ann. § 23-12-201, failure to properly sound audible warning devices, failure to keep a proper lookout, and operating the train at an excessive speed for the conditions. In addition, the Barbers alleged that the crossing was abnormally dangerous. The Barbers later nonsuited the case against Asplundh pursuant to Arkansas Rule of Civil Procedure 41(a).

Meanwhile, Mr. Barber filed a workers' compensation claim against his employer, Allied Waste Industries, Inc.[1] In response to that claim, Mr. Barber was compensated in an amount exceeding $200,000.

Union Pacific answered the Barbers' complaint, denying the material allegations, and affirmatively asserting that the claim of excessive speed was preempted by federal law. Soon thereafter, the parties entered into settlement negotiations. After mediation, Union Pacific and the Barbers agreed to "settle around" Allied's workers'

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[1] At some point prior to Mr. Barber filing his workers' compensation claim Browning-Ferris, Inc., merged into Allied Waste Industries, Inc.

compensation lien.[2] The settlement called for Union Pacific to pay the Barbers $290,000 on or before February 18, 2000, and was contingent upon a court or the Workers' Compensation Commission approving the "settle around" provision.

A notice of intent to settle was forwarded to Allied, and on February 10, 2000, the parties filed a joint petition to approve settlement around the workers' compensation carrier. On February 28, 2000, Allied filed an objection to the parties settling around Allied's statutory lien pursuant to Ark. Code Ann. § 11-9-410 (Repl. 2002), and asserted that it was entitled to a lien on the proceeds of any settlement. In addition, Allied sought to intervene in the matter pursuant to Ark. R. Civ. P. 24 and Ark. Code Ann. § 11-9-410. A hearing by telephone conference on the settlement was set for February 28, 2000. Prior to the hearing, the Barbers sent a proposed order by facsimile to Union Pacific. According to the facsimile, counsel for the Barbers intended to submit the proposed order to the court after the telephone hearing. The record does not indicate whether the order was ever presented to the court; but, on March 3, 2000, the court filed a letter order that stated as follows:

> The court having considered Allied Waste Industries, Inc's objection to petition to approve settlement around workers' compensation carrier and all matters finds:
>
> That in accordance with Ark. Code Ann. § 11-9-410 and Arkansas case law that the Plaintiffs can settle around the W.C.C. carrier if the settlement is approved by the court. However, the W.C.C. carrier will have a lien on the proceeds of the settlement.

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[2] To "settle around," the settlement agreement expressly reserved Allied's right to pursue its subrogation claim against Union Pacific to recover workers' compensation benefits paid to Mr. Barber.

In response to that letter order, the Barbers notified Union Pacific via facsimile of their intent to appeal the court's order.

At that point, and without an appeal, the parties continued to litigate the matter in the circuit court. Allied filed a complaint in intervention, which was answered by Union Pacific and the Barbers. The Barbers continued with discovery, requesting a second set of admissions, which request elicited an objection by Union Pacific in a conjunctive-motion seeking a protective order. On June 23, 2000, the court set May 29, 2001, as the trial date.

On February 12, 2001, the Barbers filed an amended complaint. In their amended complaint, the Barbers alleged that Union Pacific failed to maintain the track at the crossing to the Federal Railroad Administration's Class 4 standards, failed to issue a "slow order" calling for a speed restriction over that rail crossing, and requested punitive damages. Union Pacific filed a joint answer and motion to dismiss, denying the material allegations, and affirmatively pleading that the Barbers' claims on track maintenance and "slow orders" were preempted by federal law.

In a letter dated March 13, 2001, counsel for the Barbers proposed to start deposing witnesses after acknowledging that "[s]ince March 12th has come and gone, it appears we will be trying this case." On March 27, 2001, Union Pacific filed a motion to approve the settlement agreement procured on February 2, 2000. The Barbers responded by filing an opposing motion to withdraw their previous joint petition to settle around the workers' compensation carrier. The circuit court set a new trial date for January 7, 2002, and, by order dated August 6, 2001, denied Union Pacific's motion to approve the settlement agreement. On December 13, 2001, the court concluded that the case was not ready for trial because the case "had turned into, not an issue of what happened to whoever (sic) the poor party out there was, it's

turned into a fuss between the lawyers on evidentiary issues." As a result, the trial was reset to begin on April 30, 2002.

Following several discovery disputes, the circuit court ruled on April 29, 2002, that the Barbers would be entitled to a jury instruction on spoliation of evidence. On April 30, 2002, the circuit court ruled on Union Pacific's various motions in limine, including a request that the court prohibit any evidence or argument that the train was traveling at an excessive speed. The court granted the motion in limine as to the Barbers' excessive-speed claim on grounds of federal preemption, but denied the motion as to their claim of negligent failure to issue a "slow order."

At the close of the Barbers' case-in-chief, and again at the close of all the evidence, Union Pacific moved for a directed verdict on the Barbers' claims that the crossing was abnormally dangerous, that Union Pacific negligently failed to issue or to disclose a "slow order," and on the request for punitive damages. The court denied Union Pacific's directed-verdict motions. The case was bifurcated with the jury first deciding the issues of liability for negligence, compensatory damages, and liability for punitive damages. The matter of negligence was submitted to the jury on a general verdict form.

While the jury was deliberating on the issues of negligence liability, punitive liability, and compensatory damages, counsel for Union Pacific observed Attorney B. Michael Easley, counsel for the Barbers, pressing his ear against the deliberation room. Although Union Pacific's counsel promptly confronted Attorney Easley, causing him to remove his ear from the jury-room door, neither counsel for Union Pacific nor counsel for the Barbers brought the incident to the court's attention at that time.

The jury returned a verdict in favor of L. E. Piper, the locomotive engineer, but found for the Barbers on their

complaint against Union Pacific and awarded compensatory damages in the amount of $5,000,000 to Mr. Barber and $100,000 to his wife. In response to a special interrogatory, the jury found that Union Pacific acted with malice or in reckless disregard of the consequences, thereby establishing liability for a punitive damages award. The amount of punitive damages was set to be determined by the jury in the second phase of the bifurcated trial.

Once the jury verdict was returned and read by the court, Union Pacific informed the court of Attorney Easley's conduct during jury deliberations and moved for a mistrial. The circuit court denied the request for a mistrial, but ruled that the only additional proof it would allow the Barbers to present during the second phase of the trial would be evidence of Union Pacific's net worth. Without presenting argument of any kind, the parties stipulated to the net worth of Union Pacific at $9.6 billion. That figure was written on a board and displayed to the jury at which time the jury retired to deliberate on the amount of the punitive damages award.

While the jury deliberated, the trial judge called the attorneys into his chamber for a discussion off the record. Following that discussion, the court went on the record under a conditional seal, whereupon Attorney Easley expressed remorse for his conduct in pressing his ear to the jury-room door during deliberations and submitted himself to sanctions. After considering the events and the manner in which the punitive damages portion of the case had been handled, the court concluded that Union Pacific suffered no prejudice in the matter. Defense counsel made no comments on the record. The court reiterated that there would be no basis for granting a mistrial if Union Pacific renewed its motion.

The jury ultimately reached a verdict and assessed punitive damages against Union Pacific in the amount of

$25,000,000. Union Pacific then filed a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial or a remittitur of the punitive damages award. The Barbers responded and also requested sanctions in connection with alleged discovery violations and spoliation of evidence. All motions were denied by the court, and the parties are now before this court on appeal.[3]

I. Mistrial

Union Pacific's first point on appeal stems from opposing counsel's improper actions in pressing his ear to the door of the jury-deliberation room. After counsel for Union Pacific witnessed Attorney Easley's misconduct, he withheld disclosure of the information until the jury returned an unfavorable verdict. At that point, Union Pacific brought the misconduct to the attention of the circuit court. The trial judge was stunned by counsel's actions but ruled that the jury verdict had not been compromised. Union Pacific argued that because the trial would have to proceed into a second phase on punitive damages, a mistrial was necessary. The circuit court refused to grant a mistrial; instead, it attempted to avoid any prejudice by limiting the presentation of evidence during the second phase of the trial to a stipulation regarding Union Pacific's net worth. Specifically, the circuit court instructed the jury that it would be considering the punitive damages award against Union Pacific. Counsel for the Barbers then explained to the jury that the parties stipulated that Union Pacific's net worth was $9.6 billion. That figure was written on a board, and the jury was informed the net worth figure equaled Union Pacific's total assets minus its total debts. Neither party made any other comments or arguments to the jury.

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[3] In addition to the briefs filed by Union Pacific as appellant, and the Barbers as appellees, *amicus curiae* briefs have been filed by the Arkansas Trial Lawyers Association, Railwatch, Inc., and The Kelly Waldron Memorial Foundation.

With only the circuit court's instructions, a figure of $9.6 billion, and an explanation of how that figure was calculated, the jury retired to deliberate. On appeal, Union Pacific argues that the trial court erred in denying its motion for a mistrial or, in the alternative, its motion for a new trial.[4]

It is well settled in Arkansas that a mistrial is a drastic and extreme remedy that should be granted only when there has been error so prejudicial that justice cannot be served by continuing the trial or when the fundamental fairness of the trial itself has been manifestly affected. *Farm Bureau Mut. Ins. Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000). The trial judge is given wide latitude to determine whether a mistrial is warranted. *Engram v. State*, 341 Ark. 196, 15 S.W.3d 678 (2000). The trial court has wide discretion in granting or denying a motion for mistrial, and that decision will not be disturbed on appeal absent an abuse of discretion or manifest prejudice to the movant. *Southern Farm Bureau Cas. Ins. Co. v. Daggett*, ___ Ark. ___, 118 S.W.3d 525 (Sept. 25, 2003). In addition, to preserve a point for appeal, a proper objection must be asserted at the first opportunity. *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998). Likewise, motions for mistrial must be made at the first opportunity. *Id.*

In *Arkansas Central R.R. Co. v. Morgan*, 129 Ark. 67, 195 S.W. 402 (1917), the jury had reached a stalemate in its deliberations, whereupon they were permitted to separate after the usual admonition of the court against talking to anyone about the case or permitting anyone to talk to them. One of the attorneys in the case escorted a juror to the

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[4] A motion for new trial is governed by Ark. R. Civ. P. 59 (2003). The rule specifically provides the grounds on which a new trial may be based. Ark. R. Civ. P. 59 (2003). Union Pacific fails to explain the basis, independent of its motion for a mistrial, for its motion for new trial. Accordingly, we treat this point on appeal as a claim of error with respect to the circuit court's ruling on the motion for mistrial with the relief requested being a new trial.

attorney's home, where the juror left his young unbroken horse, and the attorney loaned him an older, gentler horse. *Id.* Opposing counsel witnessed the events as they transpired, but made no complaint to the court until after the jury reached a verdict. *Id.* This court recognized that the attorney's conduct was improper but declined to reverse stating:

> The litigant should, in fairness, make his complaint to the court as soon as the information is obtained .... And if there is to be a mistrial in such cases, it should come when the prejudicial incident is discovered and the court has determined that the integrity of the trial has been destroyed. ... Having taken its chance on the verdict of the jury by failing to speak when it should have spoken, we will not disturb the finding of the court, upholding the integrity of the verdict.

Arkansas Central R.R. Co v. Morgan, 129 Ark. at 73-74, 195 S.W. at 405 (1917). This court's ruling over eighty years ago comports with our current rule that mandates a motion for mistrial be made at the first opportunity.

In this case, the actions of counsel for Union Pacific were similar to those of appellant's counsel in *Arkansas Central R.R. Co v. Morgan, supra.* That is, after witnessing the wrongdoing, counsel gambled on receiving a favorable jury verdict before informing the court of the misconduct. In oral arguments, Union Pacific conceded that it did not inform the trial court of the attorney misconduct at the first available opportunity. We explained that counsel is required to advise the court of an attorney's misconduct as soon as the information is discovered so that the court may inquire into the incident and remove any prejudice. *Arkansas Central R.R. Co v. Morgan, supra.* Had counsel immediately brought Attorney Easley before the court and explained the situation, the court could have separated Attorney Easley from co-counsel for the Barbers, thereby

insulating him from further participation in the case and removing any prejudice that may have resulted from his improper conduct.

Instead, as a result of Union Pacific's decision to take a chance on the result of the verdict, the trial court concluded that the second phase of the trial needed to be cut short in order to prevent any possible prejudice. In the trial judge's own words, "I really thought this thing needed to be pretty well shut down and no further arguments made." The law is well settled that motions for mistrial must be made at the first opportunity. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000). The policy reason behind this rule is that a trial court should be given an opportunity to correct any error early in the trial, perhaps before any prejudice occurs. *Id.* We note that other jurisdictions have come to a similar conclusion when counsel gambles on a favorable jury verdict before bringing the issue to the court's attention. *See Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1276-77 (5th Cir. 1989) (failure to request a mistrial on claim of attorney misconduct before the jury deliberations showed that the appellants "gambled" on the jury verdict, and weighed against granting a new trial); *Raymond v. Southern Pac. Co.*, 259 Or. 629 (1971) (holding that a party has no right to gamble on the outcome of the case and to avail himself of the irregularity or misconduct if a decision is adverse to him). The Oregon Supreme Court explained that the public's interest in the efficient use of judicial time and in the finality of the judicial process does not permit a party to gamble on a verdict before making a motion for mistrial. *Raymond v. Southern Pac. Co., supra.* We hold that by waiting for the jury to return a verdict and failing to bring the matter to the circuit court's attention at the first

opportunity, Union Pacific failed to preserve this argument for appeal.[5]

II. Prior Near Misses

In its second point on appeal, Union Pacific argues that the circuit court erred in admitting evidence of prior near misses at the track crossing where the accident occurred. Union Pacific makes a two-pronged attack on the use of the prior near-miss evidence. First, Union Pacific requests that we endorse a rule that prior near-miss evidence be excluded as a matter of law in railroad-grade-crossing cases. Second, Union Pacific contends that the circuit court erred in admitting the near-miss evidence because the Barbers failed to offer sufficient proof of substantial similarity in conditions. The Arkansas Trial Lawyers Association, through its *amicus curiae* brief, has urged us to decline Union Pacific's request that near-miss evidence be declared inadmissable as a matter of law.

A. Exclusion as a Matter of Law

Union Pacific recognizes that we have already enunciated a rule that near-miss evidence is admissible "upon a showing that the events arose out of the same or substantially similar circumstances." *See Carter v. Missouri Pacific R.R. Co.*, 284 Ark. 278, 681 S.W.2d 314 (1984) (quoting *Fulwider v. Woods*, 249 Ark. 776, 461 S.W.2d 581 (1971)). Nonetheless, we are asked to overrule that case because near-miss evidence is inherently unreliable and unduly prejudicial, and, thus, should be excluded as a matter of law.

No case has been cited, and we can find none, that supports a *per se* exclusion of near-miss evidence. The admissibility of prior similar occurrences has been commonly accepted in Arkansas for many years. *See Ford*

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[5] In view of Attorney Easley's conduct during jury deliberations, a copy of this opinion will be forwarded to the Committee on Professional Conduct.

Motor Co. v. Massey, 313 Ark. 345, 855 S.W.2d 897 (1993); *Westark Specialties, Inc. v. Stouffer Family, Ltd.*, 310 Ark. 225, 836 S.W.2d 354 (1992); *Fraser v. Harp's Food Stores, Inc.*, 290 Ark. 186, 718 S.W.2d 92 (1986); *Carter v. Missouri Pacific Railroad Co.*, 284 Ark. 278, 681 S.W.2d 314 (1984); *Houston General Ins. Co. v. Arkansas Louisiana Gas Co.*, 267 Ark. 544, 592 S.W.2d 445 (1980); *Arkansas Power & Light Co. v. Johnson*, 260 Ark. 237, 538 S.W.2d 541 (1976); *Fulwider v. Woods*, 249 Ark. 776, 461 S.W.2d 581 (1971). In addition, it is generally recognized that evidence of prior similar occurrences is admissible with a showing of sufficient similarity in circumstances. *See McCormick on Evidence*, 5th ed. 1999 p. 703-04 § 200. Thus, Union Pacific presses this court to pioneer a *per se* exclusion in the face of a sound majority position. While we are urged to adopt a *per se* rule in railroad-crossing cases, the supporting theory of unreliability is not so limited. Evidence of prior similar occurrences in railroad-crossing cases is not any less reliable than prior similar occurrences in any other context.

Furthermore, a necessary predicate to the adoption of a *per se* exclusion rule would be a decision by this court to break with our prior precedent in *Carter v. Missouri Pacific Railroad Co.*, 284 Ark. 278, 681 S.W.2d 314 (1984). We have held that there is a strong presumption of the validity of prior decisions. *Bharodia v. Pledger*, 340 Ark. 547, 11 S.W.3d 540 (2000). Although we do have the power to overrule previous decisions, it is necessary as a matter of public policy to uphold prior decisions unless great injury or injustice would result. *Id.* The policy behind *stare decisis* is to lend predictability and stability to the law. *Id.* In matters of practice, adherence by a court to its own decisions is necessary and proper for the regularity and uniformity of practice, and that litigants may know with certainty the rules by which they must be governed in the conducting of their cases. *Id.* Precedent governs until it

gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable. *Id*

Union Pacific asserts that "a near miss leaves no record of the incident." We recognize that there are situations in which a near miss will occur leaving no tangible record of the incident. Yet, this does not mean that a near miss can never be verified or documented. For example, there will be occasions when the near miss is reported to the police, the railroad, or some other agency. Under the rule proposed by Union Pacific, near-miss evidence would be inadmissible regardless of its veracity. The admission of this evidence is considered on a case-by-case basis and the burden rests on the party offering the evidence to prove that the necessary similarity of conditions exists. *Westark Specialties, Inc. v. Stouffer Family, Ltd.*, 310 Ark. 225, 836 S.W.2d 354 (1992). Union Pacific has failed to demonstrate that allowing near-miss testimony into evidence gives rise to a result so patently wrong, so manifestly unjust, that a break in precedent is warranted. Accordingly, we decline to depart from our holding in *Carter v. Missouri Pacific R.R. Co.*, *supra*.

B. Substantial Similarity of Conditions

Prior to trial, Union Pacific moved in limine to prevent any evidence of near misses at the crossing where the accident occurred. The court ruled that it would allow evidence of near misses provided that they occurred within months of the accident. At trial, the Barbers introduced testimony by four witnesses about prior near misses. Union Pacific contends that the prior near-miss testimony elicited at trial did not arise out of circumstances substantially similar to the circumstances of the accident on January 19, 1998, when the garbage truck occupied by Mr. Barber was struck by one of Union Pacific's freight trains.

The general rule with respect to the admissibility of evidence of similar occurrences is that it is admissible only

upon a showing that the events arose out of the same or substantially similar circumstances. *Ford Motor Co. v. Massey*, 313 Ark. 345, 855 S.W.2d 897 (1993). The burden rests on the party offering the evidence to prove that the necessary similarity of conditions exists. *Id.* The relevancy of such evidence is within the trial judge's discretion, subject to reversal only if an abuse of discretion is demonstrated. *Id.* In *Carter v. Missouri Pacific Railroad Co.*, 284 Ark. 278, 681 S.W.2d 314 (1984), we upheld a trial court's ruling to exclude evidence of two prior near-misses. We concluded that the circumstances were not substantially similar because the flashing lights at the crossing had changed. *Id.* In determining the admissibility of prior similar occurrences, the critical question is whether the similarity of the circumstances makes it reasonable and probable that the same cause existed to produce the accident as did the near misses. *See, e.g., Chicago, R.I. & P.R. Co. v. Lynch*, 246 Ark 1282, 441 S.W.2d 793 (1969).

Whether an occurrence is substantially similar to the matter at hand depends on the underlying theory of the case. *Ford Motor Co. v. Massey*, 313 Ark. 345, 855 S.W.2d 897 (1993). For example, evidence submitted to demonstrate a dangerous condition necessitates a high degree of similarity because it weighs directly on the ultimate issue to be decided by the jury. *Id.* However, the requirement of substantial similarity is relaxed when the evidence of other incidents is used to show notice or awareness of a potential defect in a product. *Id.* The theory of the Barbers' case was that the crossing was so overgrown with vegetation to the east that drivers attempting to cross could not see to the east without placing their vehicles in the zone of danger immediately adjacent to the track.

According to the Barbers, the circumstances that caused the accident in this case are simple. As the garbage truck approached the crossing headed north, the driver looked

eastward for a train. By the time the truck's occupants were able to get a clear view to the east, the garbage truck was already at the crossing as a train came into view from the west. The Barbers asserted that due to overgrown vegetation on the south side of the train tracks at County Road Crossing 123, a northbound traveler would be unable to check safely for trains before attempting to cross. They also claimed that the engineer's failure to sound the train's whistle and bell as it approached the crossing exacerbated the situation.

The near-miss evidence permitted by the circuit court may be summarized as follows. Susan Thweatt testified that she used the crossing every Sunday to get to church and occasionally to run an errand. Between November and December of 1997, Susan was traveling to church with her husband, Vernon Thweatt, and her two daughters. She was in the backseat with one of her daughters, and Vernon was driving the car southbound. As they approached Crossing 123, Vernon looked both ways and attempted to cross the tracks. At the same time, Susan looked to the east and saw a westbound train approaching. She yelled at her husband, he immediately braked, and then backed up until the train passed. Susan was unable to identify the train as either a Union Pacific or Burlington Northern train and never made a complaint to the railroad.

Vernon Thweatt testified about the same incident. He stated that the vegetation was overgrown at Crossing 123 and that he used it about four times per week. At the time of the incident, he was driving south towards the crossing with his wife and two children in the car. Vernon first checked to see that the east was clear and then turned to the west. As he was looking to the west, his wife screamed that a train was approaching from the east. He immediately applied his brakes at which point his bumper was within ten feet of the track. Vernon testified that the train did not

sound its whistle or bell at the crossing. Vernon was also unable to identify the train as either a Union Pacific or Burlington Northern train and never made a complaint to the railroad.

Troy Meredith testified that he traveled north over Crossing 123 several times on his way to sites where he searched for arrow heads. Mr. Meredith confirmed that the brush and shrubbery on the south side of the track blocked his view to the east as he traveled north. He had an incident in the fall of 1997 at Crossing 123 while traveling north over the tracks where he had to "goose [his] car and jump across the track in order to keep from getting hit." As he approached the crossing, he first looked to his west. When he looked to the east, the brush and shrubbery blocked his view. He continued to move forward looking to the east and by the time he could see the westbound train he was in a position where the train would have hit him if he did not continue across the tracks.

Lastly, Ray Thweatt testified that he had been using Crossing 123 for fifty to sixty years. Ray also confirmed that the vegetation to the east blocked his view of the track. Twice in 1997, while traveling north over the crossing, he got so close to the tracks that he was startled when he finally saw an eastbound train.

In this case, Mr. Barber's accident resulted as the Union Pacific train traveled east and the garbage truck traveled north over the crossing. Susan and Vernon Thweatt's near miss stemmed from a southbound approach to the crossing and a westbound train. Mr. Meredith's incident, on the other hand, occurred while he traveled north over the crossing and the train traveled west. In *First Security Bank v. Union Pac. R.R. Co.*, 152 F.3d 877 (8th Cir. 1998), the Eighth Circuit Court of Appeals concluded that the trial court did not err in excluding prior accidents where the drivers and the plaintiff were traveling in opposite

directions, and, thus, had entirely different perspectives of the crossing. Likewise, Susan and Vernon Thweatt's view of the crossing from the north side was entirely different from the garbage truck driver's view on the south side of the crossing. The vegetation on the north side of the track has little relevance in determining a view from the south side of the crossing. We conclude that the trial court abused its discretion in admitting Susan and Vernon's testimony.

Nonetheless, the danger complained of stemmed from overgrown vegetation on the south side of the track. The cause of the accident was impaired visibility to northbound travelers as a result of overgrown vegetation on the south side of the track. For both Mr. Meredith and Mr. Barber, the view to the east was obscured by the vegetation on the south side of the track as they approached the crossing heading north. One difference in the circumstances of the accident and Mr. Meredith's near miss is that the trains were traveling in different directions. The issue here, however, is whether the vegetation on the south side of the track was a danger to northbound travelers regardless of which direction the train was traveling. Mr. Meredith's testimony reveals that he and Mr. Barber were in a substantially similar circumstance—the drivers in both vehicles had to inch forward to look east down the track for a train. Likewise, Roy Thweatt's near miss was caused by overgrown vegetation on the south side of the track obscuring his view to the east. Due to the high degree of similarity, we cannot conclude that the circuit court abused its discretion in admitting the near-miss testimony of Troy Meredith and Roy Thweatt.

Union Pacific also contends that the trial court erred because none of the parties could identify the near-miss trains as Union Pacific trains. As such, Union Pacific argues that the evidence is irrelevant to show notice of a defect or condition. Evidence of similar occurrences is admissible

when the notice of a danger or defect is in issue. *Fraser v. Harp's Food Stores, Inc.*, 290 Ark. 186, 718 S.W.2d 92 (1986). Evidence of similar occurrences is also admissible to demonstrate a dangerous condition. *Ford Motor Co. v. Massey, supra.* As already stated, the theory of the Barbers' case was that the crossing was so overgrown with vegetation on the south side of the track that drivers attempting to cross could not see to the east without placing their vehicles in the zone of danger immediately adjacent to the track. Under this theory, notice is not relevant; rather, the testimony of Troy Meredith and Roy Thweatt was properly admitted to demonstrate a dangerous condition.

In sum, while the circuit court abused its discretion in admitting Vernon and Susan Thweatt's near-miss testimony, we will not reverse a trial court's ruling on evidentiary matters absent a showing of prejudice. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430 47 S.W.3d 866 (2001). Evidentiary error may not be predicated upon a ruling which admits evidence unless it affects a substantial right of the party. Ark. R. Evid. 103(a) (2003); *Luedemann v. Wade*, 323 Ark. 161. 913 S.W.2d 773 (1996). We have repeatedly held that an evidentiary error is harmless if the same or similar evidence is otherwise introduced at the trial. *Luedemann v. Wade, supra*; *Williams v. Southwestern Bell*, 319 Ark. 626, 893 S.W.2d 770 (1995); *Shamlin v. Shuffield*, 302 Ark. 164, 787 S.W.2d 687 (1990); *Thompson v. AAA Lumber Co.*, 245 Ark. 518, 432 S.W.2d 873 (1968). In light of the other near-miss evidence that was properly admitted at trial, we cannot say that Vernon and Susan Thweatt's testimony, which was merely cumulative, resulted in prejudice to Union Pacific. Accordingly, we affirm on this point.

III. Directed Verdict

For its third point on appeal, Union Pacific contends that the circuit court erred in denying its directed-verdict

motions on the theory that Union Pacific negligently failed to issue a slow order and on the theory that the crossing was abnormally dangerous. At trial, the Barbers premised their claim of negligence on several theories:

> (1) The violation of an Arkansas statute requiring a railroad to maintain its right-of-way free of vegetation;
>
> (2) The presence of an abnormally dangerous crossing;
>
> (3) The failure to sound the train's audible warning devices;
>
> (4) The failure to keep a proper lookout; and
>
> (5) The violation of federal regulations requiring a railroad to instruct its employees concerning its code of operating rules, time tables, and time table special instructions.

With the five theories before them, the jury was given a general verdict form on the claim of negligence.

When the jury's verdict is rendered on a general verdict form, it is an indivisible entity or, in other words, a finding upon the whole case. *South Cent. Arkansas Elec. Co-op. v. Buck*, ___ Ark. ___, 117 S.W.3d 591 (2003). This court will not speculate on what the jury found where a general jury verdict is used. *Id.* When special interrogatories concerning liability or damages are not requested, and this court is left in the position of not knowing the basis for the jury's verdict, we will neither question nor theorize about the jury's findings. *Hyden v. Highcouch, Inc.*, ___ Ark. ___, 110 S.W.3d 760 (2003).

In this case, Union Pacific does not challenge the sufficiency of the evidence to support the general verdict of negligence. Instead, it challenges the sufficiency of the evidence on two of several theories that support the general

verdict. We cannot determine, and we will not speculate, upon which theory the general verdict of negligence was premised. The evidence in this case reveals that the vegetation at Crossing 123 was severely overgrown. The overgrown vegetation on the south side of the train tracks blocked the view of anyone driving north over the crossing. In addition, drivers had to inch forward to a point where their vehicles were almost touching the track in order to get a clear view down the track. Moreover, by the time a person was able to adequately check the track for trains, he or she was in the zone of danger. The testimony supports a finding that these conditions caused the garbage truck to be hit by the Union Pacific freight train. Here, the jury could have based its verdict of negligence on the Barbers' theory that Union Pacific failed to properly maintain the vegetation at Crossing 123. Hence, we must affirm. *See, e.g., Union Pacific R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997); *see also South Beach Beverage Co. v. Harris Brands, Inc.*, 355 Ark. ___, ___ S.W.3d ___ (Dec. 11, 2003); *Hyden v. Highcouch, supra.*

When presented with this question at oral argument, Union Pacific cited our decision in *Missouri Pacific Railroad v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988), for the proposition that a case must be reversed when a jury is presented with several theories and asked to render a general verdict. In that case, we found prejudicial error where the circuit court gave the jury an inapplicable instruction. Indeed, we have consistently held that we will presume prejudice from the giving of an erroneous instruction, unless rendered harmless by other factors. *See Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003); *Long v. Lampton*, 324 Ark. 511, 922 S.W.2d 692 (1996); *Davis v. Davis*, 313 Ark. 549, 856 S.W.2d 284 (1993); *MIC v. Barrett*, 313 Ark. 527, 855 S.W.2d 326 (1993). However, we have made a distinction between contesting the trial court's decision to give a jury instruction on one particular theory

of negligence, and challenging the sufficiency of the evidence to support a general verdict of negligence. *See Union Pacific R.R. Co. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997). Here, Union Pacific challenges the sufficiency of the evidence to support two theories of negligence but does not challenge any of the jury instructions given by the trial court. Accordingly, we do not address the propriety of any instruction, and because we conclude that there was sufficient evidence of negligence, we are unwilling to speculate upon which theory of negligence the jury premised its verdict.[6]

IV. Punitive Damages

For its fourth point on appeal, Union Pacific attacks both the propriety of awarding punitive damages and the amount of punitive damages. As a threshold matter, the Barbers contend that Union Pacific waived any challenge to the sufficiency of the evidence on punitive damages because Union Pacific failed to move for a directed verdict at the close of all the evidence. We hold that Union Pacific properly preserved this point for appeal, that there is sufficient evidence to warrant an award of punitive damages, and that the award in this case is not excessive.

At the close of the plaintiff's case-in-chief, and again at the close of all the evidence in connection with liability, Union Pacific properly moved for a directed verdict on the issue of punitive damages. Union Pacific did not, however, move for a directed verdict at the close of the evidence in the second phase of the trial on punitive damages. This second phase occurred after the jury had determined that

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[6] We note that after submission of the appeal and oral argument, Union Pacific filed a motion to submit supplemental authorities. We denied the motion on February 5, 2004. Historically, we have been loath to entertain motions which directly affect a case after submission except in the most exceptional circumstances. We do not regard this situation to be so extraordinary as to warrant the special measures requested. *See In re Crossley*, 310 Ark. 435, 839 S.W.2d 1 (1992).

Union Pacific was negligent, that it acted with malice or reckless disregard of the consequences, and assessed compensatory damages. For support, the Barbers cite *Advocat v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003), where we stated "the conclusion of all the evidence" occurs after the plaintiff's rebuttal evidence. Here, there was no rebuttal evidence and Union Pacific moved for a directed verdict at the close of all the evidence in connection with liability for punitive damages.

The purpose of a motion for directed verdict is to provide a procedure for determining whether the plaintiff has met the burden of establishing a *prima facie* case. *Wal-Mart Stores, Inc. v. Tucker*, ___ Ark. ___, 120 S.W.3d 61 (2003). A plaintiff need not establish a *prima facie* case in second phase of a bifurcated trial where only the amount of punitive damages remains to be decided. Thus, it is unnecessary for a defendant to move for a directed verdict as to liability after a jury has determined liability. Union Pacific has preserved its challenge to the sufficiency of the evidence to support an award of punitive damages by properly moving for a directed verdict on that issue at the close of all the evidence submitted in the liability phase of the trial.

A. Sufficient Evidence of Punitive Damages

We review the denial of a motion for directed verdict to determine if the jury verdict is supported by substantial evidence. *D'Arbonne Const. Co., Inc. v. Foster*, 354 Ark. ___, ___ S.W.3d___ (Oct. 9, 2003). Substantial evidence is defined as evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty, and it must force the mind to pass beyond mere suspicion or conjecture. *Id.* When determining the sufficiency of the evidence, we review the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was

entered, and we give that evidence the highest probative value. *Id.* A motion for directed verdict should be granted only when the evidence viewed is so insubstantial as to require the jury's verdict for the party to be set aside. *Id.* A motion for directed verdict should be denied when there is a conflict in the evidence, or when the evidence is such that fair-minded people might reach different conclusions. *Id.*

We have recently set out the standard for determining whether there is sufficient evidence to support an award of punitive damages in a negligence case:

> This court has said that an award of punitive damages is justified only where the evidence indicates that the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice may be inferred. *Stein v. Lukas*, 308 Ark. 74, 823 S.W.2d 832 (1992); *Missouri Pacific Railroad v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988); *National By-Products, Inc. v. Searcy House Moving Company, Inc.*, 292 Ark. 491, 731 S.W.2d 194 (1987). In other words, in order to support this element of damages by way of punishment, it must appear that the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the consequences, from which malice may be inferred. *Mackey*, 297 Ark. at 145, 760 S.W.2d at 63; *National By-Products, Inc.*, 292 Ark. at 494, 731 S.W.2d at 196. In order to warrant a submission of the question of punitive damages, there must be an element of willfulness or such reckless conduct on the part of the defendant as is equivalent thereto. *Dalrymple v. Fields*, 276 Ark.

185, 188, 633 S.W.2d 362, 364 (1982) (quoting *Hodges v. Smith*, 175 Ark. 101, 293 S.W.2d 1023 (1927)).

D'Arbonne Const. Co., Inc. v. Foster, 354 Ark. at___, ___ S.W.3d at ___ (Oct. 9, 2003). The Eighth Circuit Court of Appeals has recognized that the critical inquiry is to determine whether there is evidence that a party likely knew or ought to have known, in light of the surrounding circumstances, that his conduct would naturally or probably result in injury, and that he continued such conduct in reckless disregard of the consequences from which malice could be inferred. *See Aircraft Accident at Little Rock v. American Airlines, Inc.*, 351 F.3d 874 (8th Cir. 2003) (citing *D'Arbonne Const. Co., Inc. v. Foster*, 354 Ark. at___, ___ S.W.3d at ___ (Oct. 9, 2003)).

The evidence supporting an award of punitive damages, viewed in the light most favorable to the Barbers, is as follows. Willie Savage, a twenty-six year veteran of the railroad as a track-man, assistant foreman, and a foreman, testified for the Barbers at trial. Just before Southern Pacific Railroad's merger with Union Pacific in September 1996, he was working for Southern Pacific as a tie-gang foreman. According to Mr. Savage, a track inspector or road master would mark railroad ties that needed replacement and then a tie-gang would follow up replacing the bad ties. Savage explained that the tie-replacement was done to keep the track maintained as a sixty-mile-per-hour track. However, after Union Pacific took over the tracks, and prior to reaching the 123 Crossing, the railroad had stopped replacing all the bad ties and instituted a "cluster-buster" tie replacement program. In a cluster-buster, the tie-gang would only replace one or two ties in a string of bad ties. Mr. Savage explained that the railroad then issued a "slow order" for the portions of track where the cluster-buster replacement was being performed.

In connection with his work as a tie-gang foreman, Mr. Savage complained to his supervisor, Mac McCartney, about the 123 Crossing. Mr. McCartney went to the crossing, but stated that he was not in charge of fixing crossings. Mr. Savage was concerned that the overgrown vegetation at the crossing would prevent his men from seeing a train and that one of his vehicles crossing the tracks would get hit by a train. Mr. McCartney suggested that Mr. Savage place a flagger at the crossing before they attempted to cross it. According to Mr. Savage, one or two men would stand at the crossing and direct the vehicles to cross when it was safe. He also testified that in working for Union Pacific there was never any response to complaints about overgrown vegetation.

Carl Jones, another garbage truck driver, testified that he had experienced problems with the overgrown vegetation at Crossing 123. Mr. Jones attempted to contact Union Pacific in April 1997 to inform them about the problem. He made between seven and ten complaints by phone to Union Pacific regarding the 123 Crossing. In addition, Mr. Jones flagged down a Union Pacific worker on the road and complained that the vegetation at Crossing 123 was life threatening.

Donald DePriest, a retired locomotive engineer, locomotive fireman, and brakeman also testified for the plaintiffs. He worked for the railroad from 1962 through 2000. Mr. DePriest testified that while he worked as locomotive engineer for Union Pacific he informed the train master, Tommy Stokes, and the train safety committee that the 123 Crossing was a hazard to the railroad employees and the public because there was a danger of hitting a vehicle at the crossing.

Mayor Willetta Carroll of Palestine testified regarding her communications with Union Pacific. In 1997, Mayor Carroll contacted various personnel with Union Pacific

concerning the track going through Crossing 123, including Vice President Jack Kyle, David Peterson, and Arkansas Grade Crossing Safety Coordinator Larry Hatley. She told these persons that Crossing 123 was overgrown and unsafe.

In addition to considering the direct evidence that Union Pacific was put on notice that a life threatening condition existed at Crossing 123, the jury in this case was given an instruction on spoliation of evidence, which stated in part as follows: "In this case, the plaintiffs contend that by intentional conduct the defendant railroad failed to preserve voice tapes and track inspection records that should have been preserved. Therefore, you may, but are not required, to infer that the contents of the voice tapes and track inspection records would have been unfavorable to the defendant." In Arkansas, spoliation is defined as "the intentional destruction of evidence and when it is established, [the] fact finder may draw [an] inference that [the] evidence destroyed was unfavorable to [the] party responsible for its action." *Goff v. Harold Ives Trucking Co., Inc.*, 342 Ark. 143, 146, 27 S.W.3d 387, 388 (2000) (citing *Black's Law Dictionary* 1401 (6th ed. 1990)).

Alan J. Blackwell, a railway consultant, testified in the Barbers' case-in-chief. Prior to becoming a consultant, Mr. Blackwell worked for Union Pacific in many different roles, including track inspector, track supervisor, road master,[7] and assistant road master. After being hired by the Barbers's counsel in this case, Mr. Blackwell asked counsel to get the Union Pacific Inspector's records and the Federal Railroad Track Inspector's records. Counsel, however, was unable to get those documents from Union Pacific. He was also unable to review Union Pacific's dispatch tapes of communications between the dispatcher, the train crew, and the maintenance people. Union Pacific's director of dispatching practices and quality assurance, John Reininger,

[7] The road master is also called the manager of track maintenance.

testified as to the use of the dispatch voice tape. The voice tapes record conversations between a dispatcher and field employee. Mr. Reininger testified that Union Pacific retained the voice tapes for about ninety days, but that a claims representative could make a request to preserve the tape longer. According to Mr. Reininger, the tapes were recycled within ninety days even when people die. He also testified that the tapes would reflect reports from engineers of any dangerous condition experienced.

The discovery process in this case was the subject of testimony given by Patricia Long, a senior claims representative for Union Pacific. Ms. Long testified that she was involved as the claims representative and that she received the request for track records in October 1998 for the accident that occurred at Crossing 123 in January of that same year. She testified that the documents were retained for at least one year. Yet, according to Ms. Long, the track records in this case were no longer available when the request was made for them in October. She explained that her request for the track records was forwarded to Union Pacific's Manager of Track Maintenance in December, but no response was forthcoming. When Ms. Long followed up on the earlier request, she was advised that the track inspection records were unavailable.

Mr. Blackwell eventually made a trip to Union Pacific's headquarters in Omaha, Nebraska, and found a stack of "slow orders" concerning a different set of tracks in Louisiana that was subject to arbitration between Union Pacific and Burlington Northern Railroad. Mr. Blackwell discovered that "slow orders" for the 123 Crossing area were listed at the tail end of some of the Louisiana "slow orders." Blackwell explained that in 1996, before Union Pacific owned the tracks, various "slow orders" had been issued for the track covering the 123 Crossing. Those "slow orders" reduced the train's maximum speed from sixty miles

per hour to forty miles per hour. As noted earlier, Union Pacific merged with Southern Pacific on September 11, 1996. Although Mr. Blackwell had experience at Union Pacific maintaining computerized records of "slow orders," when he tried to find "slow orders" covering the 123 Crossing, Union Pacific told him the records did not exist. He was also unable to get Union Pacific's track inspection records. Finally, Mr. Blackwell discovered that Union Pacific had entered into a contract to have the overgrown vegetation at Crossing 123 cut back in August 1997, but it did not allot money for the contract.

Union Pacific cites this court to *Missouri Pacific Railroad v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988), as authority for its assertion that there is insufficient evidence to support an award of punitive damages. In *Mackey*, we held that while there was no question of the railroad's negligence in maintaining its right-of-way, the evidence did not support an award of punitive damages. The *Mackey* court pointed out that there was no evidence that the crossing was hazardous or that the dangers had been presented to the railroad.

Based on the evidence detailed above, we conclude that there was ample evidence that Crossing 123 was hazardous and that Union Pacific was on notice of its condition. Here, direct evidence reflects that Union Pacific was notified of an imminent danger at Crossing 123. In addition, through the spoliation instruction, the jury was at liberty to infer that the destroyed voice tapes and track records contained remarks about the near misses testified to at trial and the dangerous condition presented by the overgrown vegetation. We conclude that the evidence in this case was sufficient to allow the jury to conclude that Union Pacific likely knew or ought to have known, in light of the surrounding circumstances, that allowing the vegetation to remain overgrown and allowing trains to pass through

Crossing 123 at close to sixty miles per hour would naturally or probably result in injury, and that Union Pacific continued such conduct in reckless disregard of the consequences from which malice could be inferred.

B. Excessive Punitive Damages Award

In addition to arguing that there was insufficient evidence to support an award of punitive damages, Union Pacific argues the award given by the jury is excessive under either state or federal standards. We have recently explained the standard for reviewing a claim of excessive punitive damages:

> We consider the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party. Punitive damages are a penalty for conduct that is malicious or perpetrated with the deliberate intent to injure another. When punitive damages are alleged to be excessive, we review the proof and all reasonable inferences in the light most favorable to the appellees, and we determine whether the verdict is so great as to shock the conscience of this court or to demonstrate passion or prejudice on the part of the trier of fact. It is important that the punitive damages be sufficient to deter others from comparable conduct in the future. The conscious indifference of the alleged wrongdoer to the wrong committed is a pertinent factor in assessing punitive damages.

Advocat Inc. v. Sauer, 353 Ark. 29, 50-51, 111 S.W.3d 346, 358 (2003) (citations omitted).

We start by examining the enormity of the wrong in this case. There is evidence that Union Pacific was on notice of the dangerous and life threatening nature of this crossing through the complaints of its own personnel and the

complaints of the public. There is also evidence that several near-misses occurred at this crossing. Furthermore, the record reflects that Union Pacific destroyed important evidence directly related to this accident, including voice tapes and track inspection records. Viewing the proof and all the evidence in the light most favorable to the Barbers, we conclude that Union Pacific knew, or should have known of the extreme danger presented to the public at Crossing 123. In recognizing that danger, Union Pacific still consciously refused to remedy the situation. As such, Union Pacific's conduct reflects that it intentionally put the traveling public in harm's way. Under these circumstances, the enormity of the wrong is substantial.

There was also evidence to indicate a malicious intent perpetuated by Union Pacific. As noted by the Barbers in their brief, the record in this case reflects the development of a corporate policy at Union Pacific that put company profits before public safety. In addition to evincing that corporate policy through the handbooks given to claims representatives, the Barbers presented expert testimony from Dr. Harvey Levine who performed an economic study and opined that Union Pacific's practices reflected that policy.

Lastly, we consider the financial and social condition and standing of Union Pacific. During the second phase of the bifurcated trial where the jury was called upon to determine the amount of punitive damages, Union Pacific stipulated that its net worth was $9.6 billion. Thus, there is no doubt that Union Pacific is in a strong financial and social condition. We note that the punitive damages award of $25 million amounts to 0.260% of Union Pacific's net worth.

Taken together under all the circumstances, including the evidence that Union Pacific intentionally destroyed unfavorable evidence, we conclude that an award of punitive damages was appropriate in this case. Thus, we turn next to

determine whether the amount of punitive damages shocks the conscience of the court. The United States Supreme Court has enunciated a three-factor test to determine whether an award of punitive damages is excessive. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). A *Gore* analysis is to be undertaken by the appellate court de novo. *Advocat v. Sauer, supra.*

Under *Gore*, to determine whether Union Pacific received adequate notice of both the conduct that would subject it to punishment and the magnitude of the sanction, we consider the following three factors:

> (1) the degree of reprehensibility of the defendant's conduct;
>
> (2) the disparity between the harm or potential harm suffered by the plaintiff and his punitive damages award; and
>
> (3) the difference between this remedy and the civil penalties authorized by statute or imposed in comparable cases.

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). The three Gore criteria are to be given equal weight. *Advocat v. Sauer, supra.* We have employed the Gore test in three cases. *See Advocat Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003); *Edwards v. Stills*, 335 Ark. 470, 984 S.W.2d 366 (1998); *Routh Wrecker Service v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998).

(i) Degree of Reprehensibility

Between *Gore* and its latest decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the United States Supreme court has enunciated several factors to consider in examining the reprehensibility of the tortfeasor. The Court held in *Gore* that (1) where the harm inflicted by the tortfeasor was "purely economic in nature[,]" (2) there was no evidence that the tortfeasor had acted in bad faith,

(3) there was no evidence that the tortfeasor had "persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions [,]" and (4) the record failed to disclose any "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive," the tortfeasor's conduct was not sufficiently reprehensible to warrant the imposition of a $2 million award. In *State Farm Mut. Ins. Co. v. Campbell*, *supra*, the Court elaborated on factors for consideration when assessing reprehensibility: "whether the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

In the case at bar, the injury inflicted by Union Pacific was physical and not merely economic. Mr. Barber, as the passenger in the garbage truck, was severely injured while the driver, Mr. Rolfe, was killed. As already explained, there was evidence that Union Pacific prioritized monetary gain over the personal safety of those crossing its train tracks. In addition, the record reflects that Union Pacific engaged in acts of affirmative misconduct after being notified of the accident and the lawsuit against it. The evidence shows that Union Pacific intentionally destroyed track records and voice tapes. Furthermore, there is evidence from which a jury would reasonably conclude that Union Pacific attempted to conceal "slow orders" issued for this portion of track. The record also supports a finding that Union Pacific manifested a reckless disregard for the health and safety of others. Specifically, Union Pacific ignored the dangerous condition of a crossing in the face of constant complaints and near misses. While this was the first time that an accident had occurred at this crossing, there was

evidence of several prior near-misses. Under these circumstances, we conclude that Union Pacific's conduct was indicative of a high degree of reprehensibility.

(ii) Ratio

The *Gore* analysis also requires the court to consider the ratio of compensatory damages to punitive damages. Here, the compensatory damages were set by the jury at $5,100,000 and the punitive damages were set at $25,000,000. The multiplier in this case is roughly 5. Most recently, the Supreme Court has held that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, ... or, ... of 145 to 1." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at ___. The standard to be employed is whether the ratio is "breathtaking." *See Advocat, supra.* Under the circumstances of this case, a multiplier of 5 is justified.

(iii) Civil Sanctions

The final factor adopted by the United States Supreme Court in *Gore* for adequate notice is that of comparing the punitive damages award to the civil or criminal penalties that could be imposed for similar misconduct. *See Advocat v. Sauer, supra.* The Barbers point this court to 49 C.F.R § 213.5 (2003) and states that Union Pacific could have been fined up to $22,000 per day for each day of noncompliance. Union Pacific, on the other hand, directs this court to *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), for the proposition that a fine cannot be multiplied on the theory that each day was a separate violation because the accident only happened once. Although the Supreme Court indicated in *Cooper v. Leatherman* that it would view passing out promotional material as a single incident under the Oregon Unlawful Trade Practices Act, it made no ruling on the issue because

the lower court did not apply the proper standard of review. *Id.*

A specific federal regulation governs vegetation on railroad property. 49 C.F.R. § 213.37 (2003) provides:

> Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not—
>
> (a) Become a fire hazard to track-carrying structures;
>
> (b) Obstruct visibility of railroad signs and signs and signals:
>
> (1) Along the right-of-way, and
>
> (2) At highway-rail crossings; (This paragraph (b)(2) is applicable September 21, 1999.)
>
> (c) Interfere with railroad employees performing normal trackside duties;
>
> (d) Prevent proper functioning of signal and communication lines; or
>
> (e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

As noted earlier, Willie Savage testified that the vegetation at Crossing 123 caused his crew problems while they performed a cluster-buster repair on the railroad ties. Thus, there is evidence that the vegetation at Crossing 123 interfered with railroad employees performing normal trackside duties. The penalty provision of the federal code at issue states in pertinent part:

> a) Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not

> more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $22,000 per violation may be assessed.

49 CFR § 213.15 (2003). The regulatory provision at issue specifically contemplates recurring violations and increases the maximum penalty in those situations where a violation persists. In fact, the penalties provision of the code specifically states, "each day a violation continues shall constitute a separate offense." 49 C.F.R. § 213.15(a). Here, the evidence clearly reflects that the vegetation at Crossing 123 was potentially out of compliance from the time Union Pacific took over the tracks in September 11, 1996. Under the federal code, Union Pacific could be fined for each day of non-compliance after September 11, 1996. As such, the maximum civil penalty in this case may be calculated by multiplying $22,000 by each day of noncompliance. There were over 450 days between September 11, 1996, and the date of the accident at Crossing 123 on January 19, 1998. Accordingly, Union Pacific's noncompliance made them potentially liable for about $9.9 million.

In addition, Union Pacific could have been potentially liable under Arkansas law. The pertinent statutory provision provides:

> (a)(1) All railroad corporations operating in this state shall maintain their right-of-way at or around any railroad crossing of a public road or highway free from grass, trees, bushes, shrubs, or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways.

* * * *

> (b) Any railroad corporation failing or refusing to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for each violation.

Ark Code Ann. § 23-12-201(a)(1), (b) (Repl. 2002). The plain language of the statute contemplates that a railroad will continue in noncompliance and will be assessed proportionally to the amount of time it fails or refuses to comply. At $500 per day, the railroad's liability could approach up to $182,500 per year. We conclude that the total civil penalties authorized by law are comparable to the punitive damages award set by the jury in this case.

In *Advocat v. Sauer*, *supra*, we enforced a $21 million punitive damages award, based upon a wrongful-death claim stemming from the neglect of a nursing and rehabilitation center's neglect of an elderly patient. Here, the punitive damages award of $25 million stems from a negligence action that resulted in one person's death and caused severe and permanent injuries to another person. We will not substitute our judgment for that of the jury when there is basis in the evidence for the punitive award. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996). In addition, the penalty needs to be sufficient to deter others of such conduct. *Id.* We have also recognized that punitive damages may validly amount to a windfall for the plaintiff. *Missouri Pacific R.R. Co., v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983). Under these circumstances, where the award of punitive damages is appropriate and the net worth of the company is $9.6 billion, we cannot say that a $25 million punishment shocks the conscience.

V. The Settlement

In its last point on appeal, Union Pacific contends that the circuit court erred in refusing to approve and enforce the settlement agreement around the workers' compensation lien of Allied Waste. This point is without merit.

After going through mediation, Union Pacific and the Barbers entered into a settlement agreement. The settlement specifically stated that it was contingent upon approval and payment by February 18, 2000. A hearing by telephone conference on the settlement was set for February 28, 2000, and the Barbers sent a proposed order by facsimile to Union Pacific with a notation that counsel intended to submit the proposed order to the court after the telephone hearing. The record does not reflect whether the proposed order was ever submitted to the court. It is clear, however, that the court did not sign the proposed order. Instead, the court filed a letter order on March 3, 2000, which stated as follows:

> The court having considered Allied Waste Industries, Inc's objection to petition to approve settlement around workers' compensation carrier and all matters finds:
>
> That in accordance with Ark. Code Ann. § 11-9-410 and Arkansas case law that the Plaintiffs can settle around the W.C.C. carrier if the settlement is approved by the court. However, the W.C.C. carrier will have a lien on the proceeds of the settlement.

In response to that letter order, the Barbers notified Union Pacific via facsimile letter of their intent to appeal the court's order. In fact, neither party appealed the order, or attempted to have the court reconsider its ruling. On March 27, 2001, or more than one year after the expiration of the

settlement offer, Union Pacific sought to enforce the agreement against the Barbers.

The only substantive case that Union Pacific cites for the notion that the contract was enforceable one year after the stated expiration is *Helms v. Helms*, 317 Ark. 143, 875 S.W.2d 849 (1994). Union Pacific cites *Helms* for the proposition that the fact a party enters into a settlement that later appears to be improvident is no ground for relief. In that case, a spouse attempted to set aside a divorce settlement after admitting he consulted an attorney and nobody pressured him to sign the agreement. *Id.* *Helms* is inapposite.

Union Pacific sought to have the terms of the settlement agreement enforced. Specific performance is an equitable remedy which compels the performance of an agreement or contract on the precise terms agreed upon. *City of Crossett v. Pacific Bldgs., Inc.*, 298 Ark. 520, 769 S.W.2d 730 (1989). The precise terms of the settlement agreement called for court approval prior to February 18, 2000. The circuit court ruled that the failure of the court to approve the settlement discharged the parties from their obligation to perform under the contract. The trial court's ruling was correct.

VI. Motion To Strike

After the Barbers filed their brief on appeal, Union Pacific filed a motion to strike portions of the Barbers' brief. That motion is still outstanding as we initially passed on it until the submission of the case. In their motion, Union Pacific requests that we strike three specific portions of the Barbers' brief on appeal.

First, Union Pacific requests that we strike a "Table of Jurisdictions" included in the supplemental addendum to the Barbers' brief on appeal. The "Table of Jurisdictions" is a list of cases from across the country that hold evidence of near-misses is admissible in railroad accident cases at the court's discretion. Union Pacific contends that the list of

cases should be stricken from the brief pursuant to Rule 11 of the Arkansas Rules of Appellate Procedure and Rule 4-2 of the Supreme Court Rules. In response, the Barbers explain that while the table was only provided as a research aid to the court, it may be disregarded. Accordingly, as there is no dispute on the issue, we grant Union Pacific's request that we strike the "Table of Jurisdictions. "

Second, Union Pacific contends that we should strike a page in the Barbers' supplemental addendum described as Plaintiff's Exhibit 63-A because it is not part of the record. We note that while it appears Plaintiff's Exhibit 63-A may have been used at trial, it was never received into evidence and is not part of the record on appeal. This court will not consider a document which is included in the addendum and not in the record. *Barnett v. Monumental General Insurance Co.*, 355 Ark. ___, ___ S.W.3d ___ (Nov. 13, 2003). Accordingly, we strike Plaintiff's Exhibit 63-A from the Barbers' supplemental addendum.

Lastly, Union Pacific urges this court to strike a portion of the Barbers' brief that purportedly accuses counsel for Union Pacific of suborning perjury. The pertinent section of the brief states:

> Furthermore, while in *Gore*, at 579, the Court noted that the record failed to disclose any deliberate false statements, acts of affirmative misconduct, or concealment of evidence or improper motive, the record in this case reveals deliberate destruction of voice tapes, track inspection records, UP efforts to conceal evidence, and *suborning perjury*.

(Emphasis added.) At trial, the Barbers alleged that Union Pacific engaged in suborning perjury of key defense witnesses both before and during trial. The Barbers now assert that the statement in their brief on appeal was not an allegation of suborning perjury; rather, it was a statement of the issue before the court in upholding a punitive damages

award. The Barbers then make allegations of fact which they contend support a good faith basis for the allegation. Specifically, the Barbers explain that certain crewmen recounted the accident in crew interview briefs, and then, after meeting with counsel for Union Pacific, changed their statements. The trial court was presented with the issue in the Barbers' Response to Union Pacific's post-trial motion for judgment notwithstanding the verdict. That argument was not pursued in the hearing on the motion and the circuit court never made a ruling on it.

Gibson v. Boling, 274 Ark. 53, 622 S.W.2d 180 (1981) is instructive on the issue. In that case, we granted an appellant's request to strike a portion of the appellee's brief which implied that the former solicitors for the appellants were dishonest and committed what amounted to subornation of perjury. *Id.* While we recognize that this case has been heated from start to finish, we think that the Barbers have gone too far in their brief on appeal by suggesting that Union Pacific and its counsel suborned perjury. Indeed, the Barbers concede that they are not asking this court to determine whether suborning perjury occurred. The claim of suborning perjury is tantamount to a claim that Union Pacific acted criminally. *See* Ark. Code Ann. § 5-53-110 (Repl. 1997). We grant Union Pacific's request to strike that portion of the Barbers' brief.

Affirmed.

Dickey, C.J., and Thornton, J., dissent.

Ray Thornton, Justice, dissenting. I dissent on the basis that a $25 million punitive-damage award is excessive. I would hold that the trial court erred in denying Union Pacific's motion for remittitur of punitive damages.

A remittitur is within the inherent power of the court if an award is grossly excessive or appears to be a result of

passion or prejudice. *McNair v. McNair*, 316 Ark. 299, 870 S.W.2d 756 (1994). The reviewing court will reverse a remittitur if the punitive-damages award is supported by evidence and does not shock the conscience of the court. *Id.*

To determine whether the award is excessive under state law, we must analyze whether the jury's verdict is so great as to shock the conscience of the court. *Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003). In applying the test for excessiveness, we make a case-by-case determination, and the award of punitive damages may be reduced if the verdict shocks the conscience of the court or demonstrates that the jurors were motivated by passion or prejudice. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 922 S.W.2d 327 (1996).

I view the $25 million punitive-damage award as excessive. The facts in this case reflect a non-fatal injury to appellant, as contrasted with the facts in *Advocat, supra*, where the death of a nursing-home patient followed an extended period of neglect. In *Advocat*, we held that a punitive damage award of $63 million shocked the court's conscience, and we reduced the award to $21 million. *Id.* Before *Advocat*, the highest punitive-damages award that was affirmed by this court was $3 million. *See Airco, Inc. v. Simmons First Nat. Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982).

Here, the evidence does not support a $25 million award in punitive damages. First, I cannot find where the Arkansas Highway Department required or suggested additional safety devices at Crossing 123. Second, Patricia Long, a senior claims representative for Union Pacific, testified that in her inspection of Union Pacific track records, she found no evidence that there had been any traffic accidents at Crossing 123. Third, Union Pacific entered into a contract with Tweedy Contractors to clear the vegetation four months prior to the accident, specifically

taking affirmative steps to remedy any vegetation problem at Crossing 123, thereby demonstrating a lack of malice. For these reasons, I do not find sufficient evidence to support such an excessive award of punitive damages, and I respectfully dissent.

Because I would remit the excessive punitive damages on the basis of prior Arkansas law, it is unnecessary to delve into an analysis under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

I am authorized to state that Chief Justice Dickey joins in this dissent.

IN THE ARKANSAS SUPREME COURT

No. 03-57

UNION PACIFIC RAILROAD COMPANY,
APPELLANT

VS.

CHRIS BARBER And CLAUDETTE BARBER,
APPELLEES

ALLIED WASTE INDUSTRIES, INC.
INTERVENOR

APPEAL FROM THE
ST. FRANCIS COUNTY CIRCUIT COURT
Honorable Harvey L. Yates, Circuit Judge

VOLUME I OF II
ABSTRACT AND BRIEF OF APPELLANT

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* * *

Ruling on Post-Trial Motions
(R. 6745-6756)

THE COURT: I think the administration of justice would be better [served] for me to announce my findings to you here now rather than to take this matter and try to wallow around through it any further and then get it out in writing. ...

I want to address the attorney misconduct issue first. One thing that disturbs me in this matter is that it almost seems as if a little bit of a cloud is being thrown to the Supreme Court, assuming that is where this is going to end up, that the court, by having an informal visit with the attorneys on this issue, maybe should have had that all on the record.

As I recall, because of the unusual and sensitive nature of this, the court talked to the attorneys, and I think it was by agreement that we visited a little bit about this matter before we got into a formal setting, where we're a lot more restricted on how we proceed. As I recall, we had an informal discussion. The court allowed everybody involved to say whatever they might want to say and the court made some comments about its thoughts and feelings and got some sense of direction of where we should head. (R. 6745-6746)

Then we had a court reporter come in and we got on the record. If I recall right, the court indicated that any party could put whatever they wanted to on the record on this issue and the court would permit that. As I recall, all the plaintiffs' attorneys were present. ... The court then gave the defense counsel an opportunity to make any comments or whatever they wanted to place on the record. [That] left each party completely open to make any full record they felt they needed to on this issue that might someday be reviewed by someone. For those reasons, I'm not going to consider the affidavit of Attorney Boyda. You can show it as proffered. The record will reflect it being proffered in support of your response to their motion, but the court gave everybody ample opportunity to make any record they desired to and the court will stick with that as being whatever we consider here. (R. 6746-6747)

As the court indicated that day, I was definitely concerned about the apparent violation of the sanctity of the jury deliberations. Mr. Easley fully understood that day from the court's comments that it's not a matter that I took lightly and I was very concerned about it. I was very concerned about the trial. I was very concerned about whether or not there was prejudice to the defendants in this situation.

The court indicated, without any objection by the plaintiffs, that it felt like the plaintiffs should not make any closing argument on the issue of punitive damages, that they should not present any proof. The court was not going to allow any proof other than the net worth of the railroad. Mr. Ursery is pretty well right that I didn't sense that he was conceding any issues or anything. He offered to stipulate to the figure rather than us having to have somebody to testify to it. In fact, at one point Mr. Ursery offered to let the court read the financial statement and then I said: "No, I don't choose to do that. That would put me in the position of making an error or being, to some extent, almost a witness." That figure was then stipulated to the jury and then there was no closing argument by the plaintiffs. (R. 6747-6748)

The court indicated that if the defense chose then to make a closing argument, or if they chose to put on evidence, that the plaintiffs obviously would have their right to rebut that. I don't remember about the evidence, but I'm sure that if they would have wanted to, it would have been the same on that too. The court felt like that was the best way to handle this situation under the circumstances. I don't recall that any party particularly objected to it. However, I'm not making a finding that anybody waived any issues. I don't know that they did. ... Obviously, the court was troubled by the conduct. It was very concerned about the conduct, very troubled by it, and that's the reason

that, on its own motion basically, it renewed the issue the next morning to reconsider it, to assure it was considered, and to make sure that it was properly considered. (R. 6748-6749)

We did whatever we thought was best to handle the situation under the circumstances. Even though I think it is very inappropriate conduct, I am of the opinion, in this particular case, that it did not prejudice the defendants, at least not to the level to require a new trial in this matter. I don't think that it was that prejudicial, that justice was not served because of this issue, or that the fundamental fairness of the trial was manifestly affected. Even though it's not appropriate, I don't feel that this had any prejudicial effect on the outcome of the proceedings. The court denies the defendants' motion on that issue.

Let me mention too, I don't think that I made any findings of fact on that occasion as to what Mr. Easley may or may not have heard. I listened to what he said about it and considered that in my ruling that I made, but I don't know that I really made any finding on that. The record will reflect that correctly. I'm not finding today that I did make that finding, but the record will reflect that one way or the other. ... (R. 6749-6750)

The next matter was counsel's remarks to the jury in his opening about the FRA statistics concerning the issue of whether or not Arkansas is number one in railroad grade crossing accidents. The record will reflect how he said that. I took it that he was talking about percentages, but I don't ... recall word for word. On that issue, the court's not going to consider the affidavit of Wiletta Carroll. Whatever she testified, the court made some rulings that limited her testimony to some extent, as I recall. I don't know if it was proffered or not, but whatever she testified to at the trial is all the court's going to consider and not whatever she may

have submitted in her affidavit along with the response to this motion. (R. 6750-6751)

I'm of the opinion that Mr. Pottroff's comments are not sufficiently prejudicial. I recall the opening statement and I think that Mr. Tucker objected. I believe the record will reflect that [he] did. ... The court would not let her testify to those statistics. I know there was another witness—I want to say it was an expert witness—but apparently that witness indicated that he didn't have enough knowledge of it and the court did not allow it through that witness. So at least on two occasions, the court denied the plaintiffs an opportunity to present that particular evidence. I don't think that is sufficient, though, to support granting a new trial in this matter and the court denies that motion. (R. 6751-6752)

What I considered to be a pretty tough issue for the court is the issue of punitive damages. Whether or not to allow it to go to the jury was a tough issue at the time I first considered it. I took it seriously at that time and, of course, I take it seriously today. The court gave very serious consideration at the time to whether or not to allow the jury to consider this issue. I was of the opinion then, and I'm still of the opinion today, that there was sufficient proof presented to at least create a question of fact on whether there's conscience indifference to the safety of the public from which malice could be inferred. The court allowed it to go to the jury based on the proof concerning the vegetation, based on the proof concerning the policies of the railroad, where they administer their company on the issues involving safety and various things.

On the issue of destruction of documents, it may be that even though I don't think it was, I don't know that there was any instruction to that effect. I suppose that the jury had an opportunity to consider whether or not the railroad

may have ignored some slow orders, and obviously, if they did and found that to be so, I assume that they would consider that, whether or not that would have [gone] possibly on the punitive damages issue. But as far as the destruction of documents, the court did not make a finding on that issue. The court only allowed [sic] that there was sufficient proof concerning the documents that were destroyed and not produced to allow that issue to go to the jury, with the instruction being that if the jury found, in accordance with the requirement of the instruction, that that be the case—I think basically it has to be that it was purposeful, I forget the exact wording in the instruction—that the jury then could consider that that information would have been detrimental to the railroad company, the defendant in the case. (R. 6752-6753)

I did not send this matter to the jury on the issue of punitive damages because of destruction of documents. I sent it to the jury on what I felt was sufficient proof presented on the issue of the vegetation and then the proof throughout the trial concerning policies of the railroad company and their actions. I thought at that time that there was sufficient evidence to support sending the issue to the jury and [that it] would be sufficient to support an award, if there was such, and the court feels the same today on that issue. ... I'm of the opinion that there were sufficient facts in this case [and that] the evidence was such that it was proper to present this issue to the jury was we presented it. ... The court does not find that a new trial should be granted on this issue and denies the motion. (R. 6753-6754)

As far as the issue of whether the punitive damages are excessive, I know $25 million is a whole lot of money. That's more money than any of us ever think about in eastern Arkansas on most occasions, but then you also have to look at the net worth of the railroad. Somebody here today said

it's $9.6 [billion]—I thought the stipulated figure was $9.8 [billion]—but either way, that's an awful lot of wealth.

The jury heard the facts. Of course, the court determined that those facts would support sending it to the jury, or else it never would have been there in the beginning. The jury heard the facts about the vegetation. They heard the facts about various policies of the railroad and the actions of the railroad. They had the opportunity to consider those and they also knew what happened here. They knew what they had found to be the facts concerning the injuries to the Barbers. I'm of the opinion that when you consider the factors set out by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, [517 U.S. 559 (1996)], and these other cases, that there is sufficient evidence here to support this award in accordance with those factors. (R. 6754-6755)

I understand that's an awful lot of money and it might very well be that, in my opinion as the judge, I might not have found factually that to be the figure, but I'm not supposed to substitute my finding in place of the jury. [I] only determine whether there are sufficient facts and evidence to support the award that the jury came back with. In my opinion, there is and the court denies the motion for a new trial. (R. 6755-6756)

Leslie W. Steen
Clerk

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

April 8, 2004

Robert Stephen Shafer
William H. Sutton
Scott H. Tucker
Attorneys a Law
400 W. Capitol, Suite 2000
Little Rock, AR 72201

RE: 03 0057. Union Pacific Railroad Company v. Chris Barber et ux.

Dear Attorneys:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:jko

cc: B. Michael Easley
William Charles Frye
Robert L. Pottroff
Gene Ludwig
Maureen E. Mahoney
Bette Green, Clerk
(CIV98-312)

U.S. Constitution Article VI
Clause 2. Supreme Law of the Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution Amendment XIV
Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

49 U.S.C. § 20103 (2000)

§ 20103. General Authority

(a) Regulations and Orders.—The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.

(b) Regulations of Practice for Proceedings.—The Secretary shall prescribe regulations of practice applicable to each proceeding under this chapter. The regulations shall reflect the varying nature of the proceedings and include time limits for disposition of the proceedings. The time limit for disposition of a proceeding may not be more than 12 months after the date it begins.

(c) Consideration of Information and Standards.—In prescribing regulations and issuing orders under this section, the Secretary shall consider existing relevant safety information and standards.

(d) Waivers.—The Secretary may waive compliance with any part of a regulation prescribed or order issued under this chapter if the waiver is in the public interest and consistent with railroad safety. The Secretary shall make public the reasons for granting the waiver.

(e) Hearings.—The Secretary shall conduct a hearing as provided by section 553 of title 5 when prescribing a regulation or issuing an order under this chapter, including a regulation or order establishing, amending, or waiving compliance with a railroad safety regulation prescribed or order issued under this chapter. An opportunity for an oral presentation shall be provided.

(f) Tourist Railroad Carriers.—In prescribing regulations that pertain to railroad safety that affect tourist, historic, scenic, or excursion railroad carriers, the Secretary of Transportation shall take into consideration any financial, operational, or other factors that may be unique to such railroad carriers. The Secretary shall submit a report to

Congress not later than September 30, 1995, on actions taken under this subsection.

49 U.S.C.. § 20106 (2000)

§ 20106. National Uniformity of Regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

(3)

SEP 10 2004

NO. 04-47

IN THE

Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,

Petitioner,

v.

CHRIS BARBER, CLAUDETTE BARBER, AND ALLIED WASTE INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether—in the face of Union Pacific's concession that "a ratio of five times the compensatory award is . . . within constitutional bounds in a personal injury case"—the Arkansas Supreme Court erred in holding that the punitive damages award here conformed to due process.

2. Whether the Arkansas Supreme Court erred in rejecting Union Pacific's sufficiency of the evidence challenge to the jury verdict below.

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Respondents Chris and Claudette Barber ("the Barbers") oppose the Petition for a Writ of Certiorari. Petitioner Union Pacific Railroad Company ("Union Pacific" or "the railroad") seeks to obtain review of multiple legal issues that it did not properly preserve or present to the Arkansas Supreme Court. Most importantly, the railroad conceded below that the ratio of compensatory to punitive damages awarded in this case fell within the limits permitted by this Court's precedent, but now offers argument entirely contrary to its prior position as the cornerstone of its due process challenge. In addition, the railroad attempts to recast its challenge to the sufficiency of evidence before the Arkansas court into a new preemption argument—one that it does not even claim presents a question on which there is any division of authority among the lower courts. Because Petitioner expressly waived below the due process argument that it now presses most vigorously—and because, as to both issues raised by Petitioner, the Arkansas Supreme Court's application of settled principles to the facts was correct and implicates no disagreement among the lower courts—the Petition should be denied.

COUNTER STATEMENT OF THE CASE

Factual Background

On January 19, 1998, an eastbound Union Pacific train struck a garbage truck driven by Charles Rolfe at County Road 123 in St. Francis, Arkansas. Rolfe died at the scene from his injuries, and his passenger, Respondent Chris Barber, suffered partial paraplegia, multiple fractures of his skull and spine, ruptured disks at C6 and C7 requiring fusion, permanent brain damage, multiple ankle breaks and rib fractures, and various other injuries. Barber was released after two months in a hospital and rehabilitation center, and was given a 70% permanent impairment rating. He suffers from continuing pain (the touch of long pants or even bed sheets to his legs evokes a searing sensation) and

bowel and bladder problems, and will require medication, physical therapy, and medical treatment for the rest of his life. Now age 39, he cannot walk unassisted and cannot work.

Evidence at trial established that the crossing's conditions were so hazardous that four "near-misses" involving cars and smaller trucks had occurred there in the year prior to the Barber accident. Abst. 49-50, 56-58 (Susan and Vernon Thweatt); Abst. 59-60 (Troy Meredith); Abst. 61-62 (two near misses involving Ray Thweatt). At 50 feet from the crossing, vegetation was so dense that motorists could see only about 63 feet to the east and 270 feet to the west, even though Arkansas law required 1000 feet of visibility in both directions. Abst. 153-155. To get a clear view down the tracks, drivers had to inch forward into the zone of danger and tended to focus their attention to the east because the view was most restricted in that direction. Abst. 44-47, 51, 53, 57, 59-61, 75, 154-156, 159, 163. Moreover, large trucks often needed 15 to 20 seconds to clear the tracks because the crossing was humped 53 inches above the highway, a condition that was contributed to by Union Pacific's maintenance practices. Abst. 45, 61, 155-156, 4-SAB, 5-SAB. Chuckholes, deteriorated ties, and problems with rails sticking up above the surface of the crossing also made passage rougher and contributed to the hazardous nature of the crossing. Abst. 59, 78, 83, 113-115, 120, 2-SAB.

Prior to the accident, Willie Savage, foreman of a Union Pacific maintenance gang, considered the crossing so hazardous that he personally drove his supervisor to the site to point out the problems. The supervisor responded, "We can't do nothing about that, because we are getting paid to put in ties. We ain't getting paid to fix crossings." The supervisor did order a flagman to be posted temporarily to ensure that workers and equipment could cross safely, but nothing was done to fix the problems. Abst. 90-91. Similarly, the local mayor and a garbage truck driver for

another company testified about making, collectively, at least a dozen complaints about the crossing to Union Pacific employees. They contacted individuals ranging from Union Pacific vice presidents and state crossing safety coordinators to 1-800 hotline operators, without receiving any response. Abst. 76-77, 83-85. Union Pacific received a bid from Tweedy Contractors in 1997 to clear vegetation from the crossing for $1,465—two to three times as much as for crossings on other Union Pacific subdivisions in Arkansas—but never funded the project. Abst. 117-118; Add. 527.

During discovery, Union Pacific failed to turn over other evidence that certainly would have reflected its knowledge of hazardous conditions and election to ignore those problems prior to the accident, as well as a voice tape of the train crew's call to dispatchers immediately after the accident. Although the railroad preserves and uses voice tapes to support its positions in litigation, the tape in question was destroyed. Track inspection records were also destroyed three months after the Barbers' counsel filed a discovery request for them. Finally, although "slow orders"[1] that would have reflected maintenance needs would normally have been available by computer, Abst. 174, the railroad did not produce them in response to the Barbers' discovery requests. Instead, the Barbers' investigators found evidence that slow orders had been imposed on the crossing mixed in with documents produced in connection with another case.

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[1] Slow orders instruct trains to reduce speed below normal federal requirements. They can be issued when a track is out of compliance with federal track regulations, remaining in place until a defect is fixed, or for reasons such as maintenance work being performed in a particular area. 49 C.F.R. §§ 213.5, 213.9. Accordingly, slow orders identify maintenance needs and appropriate corrective actions.

Other evidence from Union Pacific employees and experts suggested that the railroad's repeated failure to respond to complaints about the crossing prior to the accident was due to a deliberate decision not to spend money on maintenance, Abst. 91 (Willie Savage testimony that "What I learned about working for Union Pacific and complaining about vegetation was, do what you were told and ask no questions."), or improvements to crossings that are not covered by federal and state enhancement programs. *See* Abst. 143-144 (testimony by Union Pacific's Manager of Industry and Public Projects for Arkansas that "I suppose somebody back in Omaha made a decision that they weren't going to independently fund upgrades in Arkansas. I don't know why the railroad won't spend money to upgrade crossings like County Road 123."); Abst. 128, 131 (testimony of expert Harvey Levine based on review of various railroad documents that "For years now, it has been traditionally Union Pacific's policy that that federal program is solely responsible for determining the safety needs at those crossings and then providing the funding to install safety devices."). Dr. Levine, a railroad economist, also testified that Union Pacific estimates the claims that it will pay out every year, shares the information with the Association of American Railroads, and factors those estimates into its budgeting process. Abst. 132.

Procedural Background

The Barbers filed a complaint against Union Pacific, train engineer L.E. Piper, Jr., and Asplundh Brush Control Company on October 19, 1998. They alleged that the accident was caused by Union Pacific's failure to control vegetation within its right-of-way in violation of Arkansas Code § 23-12-201, failure to alleviate an abnormally dangerous crossing, failure to sound audible warning devices properly, failure to keep a proper look out, and operating the train at an excessive speed given the crossing's conditions. The Barbers later nonsuited the case against Asplundh. On

February 12, 2001, the Barbers amended their complaint to request punitive damages as well as to allege that Union Pacific negligently failed to maintain the track to the Federal Railroad Administration's Class 4 standards and to issue a slow order imposing a speed restriction over the crossing.

After a ten-day trial, the jury found in favor of the train engineer, but returned a general verdict finding Union Pacific guilty of negligence. The jury also returned a special interrogatory finding that punitive damages were warranted because the railroad had acted with malice or such reckless indifference to probable injury that malice could be inferred. The jury awarded $5 million in compensatory damages to Mr. Barber and $100,000 to his wife; upon further deliberations, the jury assessed $25,000,000 in punitive damages against the railroad.

Upon appeal to the Arkansas Supreme Court, Union Pacific asserted that the trial court erred in denying its motion for a directed verdict on the claim of negligent failure to issue a slow order and the existence of an abnormally dangerous crossing as not supported by substantial evidence; challenged the punitive damages award as excessive under both state common law and federal due process; and asserted a number of other issues that are not raised in its Petition for a Writ of Certiorari. Concerning federal due process, the railroad's two-page argument asserted briefly that the punitive damages award should be struck down as (1) disproportionate to the reprehensibility of its conduct and the fines imposed under Arkansas statute; and (2) resting on evidence of Union Pacific's national policies rather than conduct within the state of Arkansas. Union Pacific conceded, however, that the award was not disproportionate to the compensatory damages awarded in the case. Abst. 232-233.

The Arkansas Supreme Court rejected both of Union Pacific's contentions. In reviewing the directed verdict challenge, the court noted that the railroad did not dispute the sufficiency of evidence supporting the general verdict or any of the jury instructions on legal grounds, but rather challenged only the sufficiency of evidence underlying two of several theories of negligence. It relied on Arkansas precedent to hold that a challenge to the sufficiency of evidence supporting a particular theory of negligence will be rejected where evidence supporting other theories was sufficient to uphold the verdict. *Union Pac. R.R. Co. v. Barber*, No. 03-57, 2004 WL 352525 at 9, Pet. App. 19a-21a (Ark. Feb. 26, 2004) (citing *Union Pac. R.R. Co. v. Sharp*, 952 S.W.2d 658 (Ark. 1997)). Regarding punitive damages, the court held that the award did not shock the conscience under state standards and met federal due process requirements because the degree of reprehensibility was high, single-digit ratios between compensatory and punitive damages are generally permissible, and the award was reasonably comparable to the maximum aggregate federal and state fines that could be imposed for each day that Union Pacific had controlled the tracks up to the January 1998 accident.

Union Pacific then filed a petition for rehearing asserting that its slow order challenge had been the equivalent of a challenge to the jury instructions. The Arkansas Supreme Court denied the petition without an opinion.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. UNION PACIFIC'S PRIMARY CHALLENGE TO THE PUNITIVE DAMAGES AWARD WAS WAIVED BELOW—AND PROPERLY SO IN VIEW OF THE SOUNDNESS OF THE TRIAL COURT'S RULING.

This Court explained in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996), and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 416 (2003), that the Fourteenth Amendment's Due Process Clause forbids the imposition of "grossly excessive" punitive damages by state courts. Courts reviewing punitive damages awards must therefore not only assess the nature and strength of state interests in deterring the conduct at issue, but also the proportionality of the damages in comparison to (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the punitive damages awarded and civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418; *Gore*, 538 U.S. at 568, 575.

The courts below correctly and faithfully applied these principles. The alleged splits between the Arkansas Supreme Court and the Ninth and Eleventh Circuits are illusory—the cases are easily reconciled on their facts and legal holdings. And in any event, the primary basis on which certiorari is sought—the 5-to-1 ratio between the punitive award and compensatory damages—was waived in the Arkansas Supreme Court. In short, the due process issue was properly decided below, does not involve any division of authority, and in any event was in large part waived below—making this case a singularly improper vehicle to "further illuminate the character of the standard that will

identify unconstitutionally excessive awards of punitive damages." Pet. 11 (quoting *Gore*, 517 U.S. at 568 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994))) (internal quotation marks omitted).

A. Petitioner's Principal Argument Was Waived Below.

The primary argument advanced in Union Pacific's Petition (Pet. 2, 10-11, 13-17) is its assertion that the Arkansas Supreme Court failed to heed the statement in *State Farm* that "[w]hen compensatory damages are substantial, then a lesser ratio [of punitive damages], perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

The railroad, however, flatly waived this argument below by conceding in its opening brief to the Arkansas Supreme Court that "a ratio of five times the compensatory award is . . . within constitutional bounds in a personal injury case." Abst. 232 (citing *State Farm*, 538 U.S. at 425). Accordingly, Union Pacific contended only that the punitive award in this case violated "the first and third *Gore* criteria." Abst. 232. Union Pacific never argued—or even suggested—to the Arkansas Supreme Court that the ratio of compensatory to punitive damages raised any question at all under this Court's decision in *State Farm*. Accordingly, in the face of the railroad's concession on this point, the Arkansas Supreme Court's opinion devoted only a few cursory sentences to the ratio factor; the court noted that the 5-to-1 ratio was consistent with *State Farm*'s guidance that single-digit ratios usually comply with due process requirements, but did not address this Court's discussion of 1-to-1 ratios.

The Petition essentially sandbags the Arkansas Supreme Court, contending that the decision below should be reversed because the court should have interpreted *State*

Farm as limiting damages to a 1-to-1 ratio—a ground expressly disclaimed below. Permitting the railroad to advance that argument in this Court is directly contrary to traditional practice: "Although in some instances [the Supreme Court has] allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (citation omitted). *See also, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (argument not raised below is waived).

Indeed, under "well settled" doctrine animated by federalism concerns, this Court does not review the final judgments of state courts unless "'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'" *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987) (citation omitted). Where a state supreme court's opinion is silent on a federal issue, this Court properly assumes that the issue was not properly presented and will not grant a writ of certiorari unless the petitioner demonstrates that the state court had "'a fair opportunity to address the federal question that is sought to be presented.'" *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (per curiam) (citation omitted) (dismissing writ of certiorari as improvidently granted). It thus follows *a fortiori* that where the ground advanced in the petition was expressly disclaimed below, the case is an improper one for certiorari.

Accordingly, even if there were disagreement in the lower courts about the application of the *Gore/State Farm* analysis (and, as demonstrated below, there is not), this case does not present this Court with a suitable vehicle to

address these issues. If the Court were to decide to revisit the constitutional issues addressed in *Gore* and *State Farm*, it would be far more appropriate to do so in a case in which the constitutional challenge was fully and fairly presented to the courts below. This case certainly presents no circumstances that would justify a departure from the Court's traditional practice of declining to review an issue that was explicitly conceded below.

B. Petitioner Has In Any Event Failed To Identify Any Split In Authority Involving The Opinion Below.

The Arkansas Supreme Court's decision implicates no split in authority among the lower courts.

Union Pacific misconstrues a brief reference to state common-law standards in the conclusion of the Arkansas court's excessiveness analysis, *see Barber*, 2004 WL 352525 at 16-17, Pet. App. 36a,[2] in a vain attempt to portray the court's federal due process analysis as conflicting with the

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[2] Union Pacific points to a statement that "we will not substitute our judgment for that of the jury" located in a standalone paragraph at the end of the court's excessiveness analysis. Although the court admittedly did not provide a clear transition into the paragraph, the passage appears to respond to Union Pacific's *separate* argument that the punitive damages award violated state standards as well as federal. *Compare* Abst. 231-232 (briefing on state issues), *with* Abst. 232-233 (federal). The paragraph applies a state "shock the conscience" standard as articulated in two cases that contain no federal analysis whatsoever. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 922 S.W.2d 327 (Ark. 1996); *Missouri Pac. R.R. Co. v. Arkansas Sheriff's Boys' Ranch*, 655 S.W.2d 389 (Ark. 1983). The third case cited in the paragraph struck down a punitive damages award separately under both state and federal standards. *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 357-59 (Ark. 2003) (state "shock the conscience"), 359-63 (federal due process), *cert. denied*, 124 S.Ct. 532 (2003).

Ninth Circuit's opinion in *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001). In reality, both courts recognized and followed this Court's holding that the constitutional due process analysis under the *Gore/State Farm* factors should be performed using *de novo* review. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) ("[T]he courts of appeals must review the proportionality determination '*de novo*' . . . ."); *In re Exxon Valdez*, 270 F.3d at 1240 ("'[C]ourts of appeal should apply a de novo standard of review . . . .'" (citation omitted)); *Barber*, 2004 WL 352525 at 14, Pet. App. 31a ("A *Gore* analysis is to be undertaken by the appellate court *de novo*."). The passing reference to state standards is irrelevant to the court's five-page analysis of the *Gore/State Farm* elements, which accorded no deference to the jury or the trial court. *See Barber*, 2004 WL 352525 at 14-16, Pet. App. 31a-36a; *infra* Section I.C.

In addition, the railroad distorts the holding of *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), *cert. denied, sub nom. Combustion Eng'g, Inc. v. McGill*, 528 U.S. 931 (1999), which does not apply to the facts of this case. *Johansen* merely noted that where an actual fine is imposed for the same conduct that is at issue in civil litigation, that fine is generally "the most relevant comparison" for purposes of the third *Gore/State Farm* factor. *Id.* at 1337 & n. 34. And even when such a fine is imposed and adequately reflects the strength of state interests, *Johansen* did not hold that the penalty rigidly caps punitive damages. Instead, the court upheld a $4.35 million punitive damages award in the context of a $10,000 fine and $47,000 in compensatory damages because "the Georgia statutes provided fair notice . . . that [the defendant] might be subject to a substantial penalty." *Id.* at 1339. Since no penalty was imposed in this specific case, the Arkansas Supreme Court's decision to uphold the award in the face of potential state and federal penalties was consistent with both *Johansen* and this Court's directive to evaluate the amount of punitive damages in light of the "civil penalties

authorized or imposed in comparable cases." *Gore*, 517 U.S. at 575.[3] *See also infra* Section I.C (discussing the merits).

C. The Arkansas Supreme Court Properly Applied The *State Farm* Analysis.

Even were it appropriate for this Court to take the extraordinary step of granting certiorari to review a factbound claim of error in the application of settled law, *see* S. Ct. R. 10, Union Pacific's various claims of error are wrong. The Arkansas Supreme Court has carefully applied the *Gore/State Farm* analysis in the past to reduce excessive punitive damages awards, *see Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003), *cert. denied*, 124 S.Ct. 532 (2003). In contrast, the Arkansas Supreme Court properly concluded that such action was not warranted on the facts of this case.

To begin with "the most important indicium of the reasonableness of a punitive damages award," *Gore*, 517 U.S. at 575, the degree of reprehensibility of Union Pacific's conduct was significant. Most of the reprehensibility factors identified in *State Farm* are present in this case: (1) the harm caused was severe physical injury and death, rather than mere economic damage; (2) the railroad's conduct evinced such a reckless indifference to public health and safety as to warrant the inference of intentional malice; and (3) the railroad's conduct involved the failure to respond to more than a dozen warnings by its own employees, local

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[3] Indeed, subsequent Eleventh Circuit cases have applied an analysis similar to what the Arkansas Supreme Court used in *Barber*. *See United States E.E.O.C. v. W & O, Inc.*, 213 F.3d 600 (11th Cir. 2000), *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003), *Copley v. Bax Global, Inc.*, 97 F. Supp. 2d 1164 (S.D. Fla. 2000), *Lambert v. Fulton County*, 97 F. Supp. 2d 1380 (N.D. Ga. 2000), *Register v. Rus of Auburn*, 193 F. Supp. 2d 1273 (M.D. Ala. 2002).

residents, and public officials that the crossing presented a severe hazard. *See* 538 U.S. at 419. Particularly in light of the fact that Union Pacific posted flagmen to ensure that its own employees and equipment could use the crossing safely but failed to afford any protections to the motoring public, the jury and the Arkansas Supreme Court quite reasonably concluded that the railroad's conduct was "indicative of a high degree of reprehensibility." *Barber*, 2004 WL 352525 at 15, Pet. App. 33a.[4]

As for the proportion of punitive to compensatory damages, the Arkansas court properly noted that a ratio of slightly less than 5-to-1 was consistent with this Court's general guidance before moving on to focus on the third *Gore/State Farm* factor. *Id.* ("Most recently, the Supreme Court has held that '[s]ingle-digit multipliers are more likely

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[4] Union Pacific asserts that the conduct at issue in the case "even viewed in its worst light[] was barely more culpable than simple negligence," Pet. 14, but ignores the fact that under the jury instructions and Arkansas law, the jury could only award punitive damages if it found that the railroad acted with malice or with such reckless disregard for probable injury that malice could be inferred. Tr. 6550-6551. *See also Missouri Pac. R.R. Co. v. Mackey*, 760 S.W.2d 59, 63 (Ark. 1988) (noting that punitive damages must be based on a finding that the defendant acted intentionally or "with such conscious indifference to the consequences of [its] acts that malice may be inferred," and emphasizing that gross negligence is not sufficient). It must necessarily be presumed that the jury obeyed those instructions, *see Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (describing "the almost invariable assumption of the law that jurors follow their instructions"); *Pearson v. Henrickson*, 983 S.W.2d 419 (Ark. 1999) (same), and the jury's factual findings as to motive are entitled to deference. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 & n.14 (2001). Indeed, the Petition concedes this at another point. *See* Pet. 26-27 & n.17 ("Presumably any facts explicitly found by the jury on a special verdict form qualify for deference, as do facts necessarily implied by the jury's verdict on liability or its finding authorizing punitive damages.").

to comport with due process, while still achieving the State's goals of deterrence and retribution . . . .'" (quoting *State Farm*, 538 U.S. at 425)).[5]

Even if Union Pacific had not waived reliance on *State Farm*'s discussion of 1-to-1 ratios, the Arkansas court would have been fully justified in upholding the award. *State Farm* suggested that where compensatory damages are "substantial," "a lesser ratio [of punitive damages], perhaps only equal to compensatory damages" may reach constitutional limits, but immediately went on to note that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct *and* the harm to the plaintiff." 538 U.S. at 425 (emphasis added). Accordingly, the Court's analysis of whether the $1 million compensatory award at issue in *State Farm* was "substantial" focused on case-specific factors such as the nature of the plaintiffs' injuries and the fact that punitive damages would be largely duplicative of compensatory damages. *Id.* at 426. In this case, it is not at all clear that in light of the defendant's conduct (repeated and deliberate failure to correct a known public safety hazard) and the harm to the plaintiff (permanent debilitation and chronic pain), a $5 million compensatory award is so "substantial" as to displace the general rule that single-digit multipliers satisfy due process concerns. *See id.* at 425.[6]

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[5] The court's statement that "'breathtaking'" disparities are impermissible quoted *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 361 (Ark. 2003), *cert. denied*, 124 S.Ct. 532 (2003), which itself quoted *Gore*, 517 U.S. at 583. 2004 WL 352525 at 15, Pet. App. 33a.

[6] For the same reason, Union Pacific's citation of cases involving compensatory damages awards exceeding $200,000 as supporting its assertion that lower courts have misunderstood *State Farm*'s directive is of no assistance because it ignores *State Farm*'s fact-specific "substantiality" analysis. Pet. 15-17 n.8.

Moreover, even where compensatory damages do meet the "substantial" threshold, *State Farm*'s suggestion that a 1-to-1 ratio may approach constitutional limits cannot serve as the absolute prescription that Union Pacific now suggests. If it did, the ratio analysis would replace reprehensibility as "the most important indicium of the reasonableness of a punitive damages award," *Gore*, 517 U.S. at 575, and impose an absolute ceiling in certain cases without regard for whether state goals of deterrence and retribution have been achieved, *State Farm*, 538 U.S. at 425; *Gore*, 517 U.S. at 568. Because such considerations cannot be resolved without weighing individual circumstances and all three of the *Gore/State Farm* elements, the Court has consistently refused to read the general command of due process as imposing the "bright-line ratio[s]" on which Union Pacific insists. *State Farm*, 538 U.S. at 425. *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line . . . .").

With regard to the final factor, the Arkansas court properly considered "'legislative judgments concerning appropriate sanctions for the conduct at issue,'" *Gore*, 517 U.S. at 583 (citation omitted), by comparing the punitive damages award to "civil penalties authorized or imposed in comparable cases." *Id.* at 575. Given that federal regulations explicitly provide that each day a violation continues constitutes a separate offense, the court estimated—based on a maximum federal penalty of $22,000 and state penalty of $500—that the potential liability for noncompliance over the period Union Pacific controlled the tracks was nearly $10 million. 2004 WL 32525 at 16, Pet. App. 35a-36a. The court's conclusion that the total civil penalties authorized by law were sufficiently comparable to uphold the punitive damages award is far more conservative than the Eleventh Circuit's opinion in *Johansen*, on which Union Pacific relies. *Johansen v. Combustion Eng'g, Inc.*,

170 F.3d 1320, 1339 (11th Cir. 1999) (upholding a $4.35 million punitive award based on the conclusion that a $10,000 maximum fine "provided fair notice . . . that [defendant] might be subject to a substantial penalty"), *cert. denied, sub nom. Combustion Eng'g, Inc. v. McGill*, 528 U.S. 931 (1999). While Union Pacific attempts to undermine the Arkansas court's holding by arguing that it failed to consider other jury awards and actual Federal Railroad Administration fines, this argument is also waived on account of the railroad's failure to raise these issues below.[7]

Thus, while the Petition distorts the record to suggest that the Arkansas Supreme Court based its *State Farm* decision primarily on the railroad's destruction of evidence and testimony about out-of-jurisdiction conduct, the court properly concluded that the punitive damages were not "grossly excessive" under any of the *Gore/State Farm* elements.

In any event, the spoliation instruction given below stands as a further reason why this case is ill-suited for

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[7] The Petition attempts a comparison with the award in *Brown v. Missouri Pacific Railroad*, 703 F.2d 1050 (8th Cir. 1983), Pet. 9 & n.5, but the railroad only cited this case to the Arkansas Supreme Court for purposes of analyzing reprehensibility under state common-law standards. Abst. 231-232. *Cf. Adams v. Robertson*, 520 U.S. 83, 88 (1997) (per curiam) ("The discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.'" (citation omitted)). Similarly, Union Pacific neither cited *Johansen* nor provided the Arkansas Supreme Court with any evidence of actual federal fine levels. Abst. 232-233; Reply Br. 12-13. Had the railroad presented the arguments below that it includes now in its Petition, the Barbers would have had a full opportunity to respond to the appropriateness of comparing the award to fines computed over a period of years and/or fines applied to hazardous material violations. This Court's general rule barring arguments that were not presented to the courts below is designed to prevent just this type of sandbagging.

review in this Court. An instruction permitting the jury to infer that the contents of intentionally destroyed records would support the opposing party's case is a routine instruction—one with which Union Pacific is quite familiar. *See, e.g., Stevenson v. Union Pac. RR. Co.*, 204 F.R.D. 425 (E.D. Ark. 2001), *aff'd in relevant part*, 354 F.3d 739 (8th Cir. 2004) (upholding the use of such instruction in connection with Union Pacific's practice of recording over voice tapes relating to serious accidents and its failure to preserve track inspection records after receiving discovery requests); *Privett v. Union Pac. R.R. Co.*, No. 3:99cv00110, slip op. at 9 (E.D. Ark. Jan. 13, 2003) (use of instruction with regard to destruction of voice tapes). The railroad never appealed the issuance of the instruction in this case, nor argued to the Arkansas Supreme Court that it raised any issue under *State Farm*.

Accordingly, as the case comes before this Court, the evidentiary record must be viewed through the lens of the properly given instruction—that jurors could infer that the records destroyed by Union Pacific would have further supported the Barbers' claims that the railroad had acted with conscious disregard of a known risk to public safety. The already significant evidence concerning Union Pacific's deliberate failure to correct a known safety hazard, viewed in light of this instruction, further supports the Arkansas Supreme Court's reprehensibility analysis, and makes this case a particularly poor candidate for this Court's review.[8]

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[8] Contrary to Union Pacific's implication, the trial court's instructions never suggested that the jury should award punitive damages simply *because* the railroad destroyed evidence. The trial court specifically rejected this contention and explained that it sent the punitive damages issue to the jury because of the evidence concerning reprehensibility (i.e., evidence on vegetation, ignored warnings, and related policies). Pet. App. 48a.

Finally, with regard to the evidence of Union Pacific's policy of refusing to make safety enhancements to crossings not covered by federal and state enhancement programs, the use of such evidence was entirely consistent with *State Farm*'s statement that "out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortuous, but *that conduct must have a nexus to the specific harm suffered by the plaintiff.... A defendant should be punished for the conduct that harmed the plaintiff*, not for being an unsavory individual or business." *State Farm*, 538 U.S. at 422-23 (emphasis added).[9]

Moreover, the railroad misreads *State Farm*'s warning that "a defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." 538 U.S. at 422. That statement referred to other types of substantive misconduct perpetrated against other State Farm customers, not the concealment of evidence reflecting on the course of conduct at issue in the case. In fact, the Court went on to suggest that State Farm's failure to report a prior $100 million punitive damages award could potentially have been relevant to the reprehensibility analysis if the prior case had involved the same type of misconduct alleged by the plaintiffs. *Id.* at 427. *See also id.* at 423 (recidivists more reprehensible because they have repeated misconduct known to be unlawful). Similarly here, the railroad's destruction of evidence reflecting its knowledge of and reaction to crossing conditions could support an inference that the records would have illustrated Union Pacific's deliberate disregard of a known risk to public safety.

[9] Union Pacific also asserts that *State Farm*'s general prohibition against basing punitive damages awards on out-of-state conduct should extend to prohibit reliance on conduct that was purportedly lawful under preemptive federal statutes. Pet. 19-21. This argument also is waived because the railroad neither challenged the punitive damages award on this basis before the Arkansas Supreme Court, nor raised the question in its challenges to evidence concerning the issuance of slow orders either in initial briefing or in the petition for rehearing. As discussed *infra* in

Here, the evidence directly related to Union Pacific's response to requests to improve abnormally hazardous crossings, including the crossing at County Road 123. *Cf. CSX Transp., Inc. v. Palank*, 743 So. 2d 556 (Fla. Dist. Ct. App. 1999), *cert. denied*, 531 U.S. 822 (2000) (company policies and budgeting led to failure to inspect defective switch causing derailment). Unlike *State Farm*, the crossing policy evidence did not involve "conduct that bore no relation to the [plaintiffs'] harm," but rather the exact conduct at issue in the case. *State Farm*, 538 U.S. at 422. Moreover, this case does not raise the same type of concerns that this Court expressed in *State Farm* about the plaintiffs' arguments and the lower courts' treatment of out-of-state evidence. The Barbers did not repeatedly urge the jury to hold Union Pacific "'accountable for what it's doing across the country, which is the purpose of punitive damages,'" and the appellate court did not uphold the award on the basis of "tangential" issues and "unrelated testimony." *Id.* at 420-21 (citation omitted), 424.

Instead, the evidence added to the already substantial showing of reprehensibility by suggesting that Union Pacific's actions in this case reflected not just an intentional disregard for public safety, but a cold financial calculation that could only be deterred by imposing damages beyond the range of compensatory damages typically awarded in cases involving serious injury or death.[10] *See Brown v. Missouri*

Section II, this case presents an unsuitable vehicle for reviewing federal preemption issues.

[10] As discussed in the Counter Statement of the Case, the policy evidence came from several sources. Dr. Levine's testimony regarding his experiences with Union Pacific and other railroads through his prior work at the Association of American Railroads was properly introduced to establish his credentials and familiarity with Union Pacific in particular. The fact that Dr. Levine stated that he criticized all railroads for not

Pac. R.R., 703 F.2d 1050, 1053 (8th Cir. 1983) ("The Arkansas Supreme Court will allow punitive damages to deter a defendant from deciding it is cheaper to be sued and pay compensatory damages than to remedy a dangerous condition.").

II. THE ARKANSAS SUPREME COURT PROPERLY RESOLVED UNION PACIFIC'S CHALLENGE TO THE SLOW ORDER EVIDENCE AS IT WAS PRESENTED BELOW.

The Petition asserts that imposing liability on Union Pacific on account of the failure to issue "slow orders" for trains traveling through the crossing at County Road 123 is federally preempted, and that both the general verdict and the punitive damages award must therefore be overturned. It is not even argued, however, that there is any division of authority in the lower courts on this issue, or that the issue is in any way independently certworthy. In this regard, the Petition seeks mere error correction.

Moreover, the railroad's claim of clear error is both incorrect and inadequately preserved. The record on this issue, and its presentation to the Arkansas Supreme Court on review, was sufficiently muddled that the Arkansas Supreme Court quite properly construed Union Pacific's brief as simply challenging the sufficiency of the evidence.

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spending enough money on grade crossing safety in response to a cross examination question, Abst. 136, hardly invalidates his assessment of Union Pacific's financial and policy materials or the Union Pacific employees' testimony regarding policies and practices. As for statistics referenced in opening argument that were not ultimately introduced at trial, the trial court provided an appropriate cautionary instruction. Tr. 6540. *See also, e.g., Nobles v. Casebier*, 938 S.W.2d 849, 851 (Ark. 1997) (instruction obviates need for new trial).

Because the Arkansas court's resolution of that sufficiency of evidence challenge was proper, there can be no serious contention that this issue merits this Court's review.

The record in this case concerning speed and slow orders is, in a word, a jumble. In response to Union Pacific's motion to dismiss and motions in limine, the Barbers presented three alternative arguments: (1) that although claims of excessive speed were preempted, their claim that the railroad negligently failed to issue a slow order was not; (2) that even if the claim that state law required Union Pacific to issue a slow order was preempted, the railroad nevertheless violated a *federal* duty to issue a slow order; and (3) that the evidence was relevant because the railroad may have in fact issued slow orders evidencing knowledge of hazardous conditions and then concealed that evidence. Abst. 21-28.[11]

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[11] This Court has held that federal speed rules generally preempt common law negligence standards, but that the Federal Railroad Safety Act explicitly exempts state standards governing "'essentially local safety hazard[s]'" from such preemption. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662 (1993) (quoting 45 U.S.C. § 434, now codified as amended at 49 U.S.C. § 20106). *Easterwood* also reserved the question of whether, aside from direct claims of excessive speed, "related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard" are federally preempted. *Id.* at 675 n.15. At least one lower court has correctly held that failure to issue slow orders required under federal standards can be the basis for negligence actions. *See Stone v. CSX Transp., Inc.*, 37 F. Supp. 2d 789 (S.D. W. Va. 1999).

Easterwood also held that state negligence claims are preempted when federal funds "participate" in the installation of warning devices at a particular crossing. 507 U.S. at 671-73. *See also Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000). No federal funds were used at the crossing over County Road 123, Abst. 129, so arguments and evidence regarding Union Pacific's failure to install additional warning devices were proper.

The trial court permitted the Barbers to introduce certain evidence concerning the issuance of slow orders, but its reasoning was concededly opaque.[12] The trial court's only specific instruction to the jury concerning speed or slow orders was:

> There was in force in the United States and the State of Arkansas at the time of the occurrence, [a] federal regulation[] which provided . . . the federally authorized speed for this track on the date of the accident was 60 miles per hour. A violation of [this] regulation[], although not necessarily negligence, is evidence of negligence to be considered by you along with all the other facts and circumstances in the case.

Tr. 6546-6547. The court never stated that Union Pacific had a duty to issue slow orders, and warned jurors that "[y]ou should not consider any rule of law [with] which you may be familiar unless it is included in my instructions." Tr. 6539.

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[12] Evidence concerning the slow orders was relevant to several issues in the case, including the track conditions that caused or contributed to the accident, Union Pacific's knowledge of such conditions, the railroad's course of conduct in response to such knowledge, and spoliation of evidence. The trial court's assessment of each of the Barbers' three arguments was somewhat unclear. *See, e.g.*, Abst. 41 ("[O]ther than the issue involving slow orders, whether they should or shouldn't issue them or maybe did, as far as the actual speed itself, it's preempted."), 99 ("I know that's preempted, unless there's a slow order in effect. But even though there may be case law to that effect, if a slow order is in effect internally because there's something wrong with the track, that would be relevant and go to the issue of negligence."), 123 (permitting testimony that "[t]here was a negligent failure to slow-order the tracks" based on the condition of the ties), 167 ("My ruling on the motion in limine was that as to the issue of speed, that it is preempted, and the only way the court would allow that issue would be if there was some type of slow order. . . . I'm not changing my ruling, I'm just repeating it.").

Union Pacific neither objected to the speed instruction nor requested any other instruction with respect to slow orders.

On appeal, Union Pacific presented the slow order issue to the Arkansas Supreme Court under the heading "The Circuit Court erred in denying the motion for a directed verdict on the claim of negligent failure to issue a slow order and on the claim that the crossing was abnormally dangerous," followed by a general statement that the applicable standard of review "is whether the verdict is supported by substantial evidence." Abst. 222. Union Pacific went on to discuss two of the Barbers' three arguments for why the slow order evidence was proper, and then concluded with the statement, "the court should have granted UP's motion in limine and motion for a directed verdict on the claim that UP negligently failed to issue a slow order." Abst. 224.

The Arkansas Supreme Court properly evaluated Union Pacific's arguments as presented. *See* Ark. S. Ct. R. 4-2(7) ("Arguments shall be presented under subheadings numbered to correspond to the outline of points to be relied upon. For each issue, the applicable standard of review shall be concisely stated at the beginning of the discussion of the issue."). The court noted that the railroad's arguments regarding slow orders and abnormally dangerous crossings did "not challenge the sufficiency of the evidence to support the general verdict of negligence. . . . [but rather] challenge[d] the sufficiency of the evidence on two of several theories that support the general verdict." *Barber*, 2004 WL 352525 at 8, Pet. App. 19a-20a. Emphasizing that Union Pacific had not challenged the jury instructions, the court distinguished a string of cases under Arkansas law requiring reversal when a jury is presented with an erroneous

instruction concerning one of several legal theories presented in a case. *Id.* (citing, e.g., *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003), *cert. denied*, 124 S.Ct. 532 (2003)).[13] Instead, the court applied an earlier decision holding that it would not reverse based on a sufficiency of evidence challenge to one particular theory of negligence when the evidence was sufficient to support the verdict on other negligence theories presented to the jury. *Id.* (citing *Union Pac. R.R. Co. v. Sharp*, 952 S.W.2d 658 (Ark. 1997)). Because the evidence concerning violation of state vegetation statutes was sufficient to support the verdict, the court affirmed the trial court's judgment. *Id.*

Union Pacific, which had unsuccessfully sought leave to file supplemental authorities on this issue after oral argument in the Arkansas Supreme Court, then filed a petition for rehearing characterizing its earlier challenge as the "practical equivalent of a challenge to the way the jury was instructed on the law." Reh'g Pet. 4. The railroad also asserted for the first time that because the case involved federal issues, it should be governed by federal standards requiring reversal of general verdicts if legal error infected any theory on which the jury may have relied. Reh'g Pet. 9 (characterizing *Sharp* as a novel rule of state law). The

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[13] Indeed, the court seemed implicitly to question whether the slow order issue had actually been presented to the jury as a theory of negligence in the case, since it identified the Barbers' five theories of negligence as (1) violation of Arkansas statutes on vegetation control; (2) the presence of an abnormally dangerous crossing; (3) failure to sound the train's horn; (4) failure to keep a proper lookout; and (5) violation of federal regulations requiring railroads to instruct their employees concerning operating rules, time tables, and time table special instructions. *Barber*, 2004 WL 352525 at 9, Pet. App. 19a. The failure to instruct theory was based on evidence concerning railroad procedures for the reporting of safety problems, keeping a proper lookout, and use of the train's horn. *See* 3-SAB, 4-SAB, 6-SAB.

Arkansas Supreme Court denied the petition without an opinion.

Nothing here merits review in this Court. *First*, it is not even argued that there is any division of authority on this question. No serious contention is made that this issue is independently certworthy.

Second, on account of Union Pacific's failure properly to preserve and present the arguments below that it now attempts to advance, there is no clear ruling on the merits from either court below for this Court to review. The railroad failed to clarify the basis of the trial court's ruling and failed to object to the jury instructions on speed or request an instruction on slow orders. On appeal, Union Pacific framed its challenge as focusing on the sufficiency of the evidence.[14] The railroad also failed to raise its new arguments regarding federal procedural preemption until its petition for rehearing, which is too late.[15] *See, e.g., Pannell*

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[14] It also failed to assert to the Arkansas Supreme Court that evidence of conduct that is allegedly governed by federal standards cannot be used to support a punitive damages award under *State Farm*. *See supra* note 6.

[15] Union Pacific's arguments are also unpersuasive on the merits. The "general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (citation omitted). The railroad invokes a narrow exception found in cases that have overridden local procedural rules concerning pleading requirements, exhaustion, and similar threshold issues that "burden[] the exercise of [a] federal right" in a manner that is inconsistent with congressional intent. *See, e.g., Felder v. Casey*, 487 U.S. 131 (1988); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1950). With regard to "neutral state Rule[s] regarding the administration of the courts," however, this Court applies a strengthened presumption against preemption. *Johnson v. Fankell*, 520 U.S. 911, 918 (1997).

The Arkansas court's treatment of sufficiency of evidence challenges where there is independent evidence to support liability under another

v. State, 897 S.W.2d. 552 (Ark. 1995) (per curiam) (petitions for rehearing shall not encompass new facts, new briefs, and new arguments); *see also Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997) (per curiam) ("[W]e have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question.").

Third, the Arkansas Supreme Court properly resolved the slow order issue as it was framed by Union Pacific at the time. In the context of a challenge to the sufficiency of evidence on one of several theories of negligence, the court's ruling was consistent not only with its own precedent,[16] but also with this Court's holding in *Griffin v. United States*, 502 U.S. 46, 56 (1992) (rejecting the contention that the Court should set aside a general verdict because one of the possible bases of conviction was supported by insufficient evidence, since jurors are well equipped to evaluate factual inadequacies for themselves).

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legal theory is a neutral administrative rule entitled to federal respect. The rule does not discriminate between federal and state claims. *Cf. Howlett*, 496 U.S. at 380; *Felder*, 487 U.S. at 140-45. Nor does a rule concerning appellate review of *evidentiary* challenges to plaintiffs' theories of liability burden railroads' federal rights to raise *legal* challenges to those same theories on grounds of preemption. *Cf. Fankell*, 520 U.S. at 921 (rule regarding availability of interlocutory appeal does not burden defendants' substantive ability to raise sovereign immunity defense under federal law). In any event, where the holding was consistent with this Court's own precedent, *see infra*, the rule cannot be characterized as "'frequently and predictably produc[ing] different outcomes'" than would occur in federal court. *Fankell*, 520 U.S. at 920-21 (citation omitted).

[16] *See, e.g., Union Pac. R.R. Co. v. Sharp*, 952 S.W.2d 658 (Ark. 1997); *W.M. Bashlin Co. v. Smith*, 643 S.W.2d 526 (Ark. 1983); *Franklin v. State*, 240 S.W. 708 (Ark. 1922).

Thus, much like Union Pacific's due process arguments, the railroad did not properly present and preserve below the arguments it now advances to this Court. Because there is no contention that this issue is one on which the lower courts are divided, and because the garbled record in this case renders it a particularly poor candidate for this Court's review of the underlying preemption arguments, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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No. 04-47

In the Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,

PETITIONER,

v.

CHRIS BARBER, CLAUDETTE BARBER, AND ALLIED WASTE INDUSTRIES, INC.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The petition demonstrated that this case would be an excellent vehicle for this Court to provide much-needed guidance on the application of *Gore* and *State Farm*. It squarely presents several open questions that have bedeviled and divided the lower courts, including: the appropriate "reprehensibility" analysis in cases involving no intentional misconduct; the proper "ratio" analysis when compensatory damages are substantial; the relevance of alleged misconduct in other states and by other companies; the limits on state power to punish defendants for conduct governed by preemptive federal law; and the appropriate standard of review for the evaluation of reprehensibility when the jury has made no specific factual findings. It also presents a preemption question of great importance to federal rail safety policy. Respondents essentially concede that there was no *intentional* misconduct by UP, and that this jury may well have fined UP $25 million for failing to "slow order" trains—despite the fact that federal law entirely preempts state claims premised on train speed. Respondents offer no persuasive reason to deny certiorari.

1. Respondents' waiver argument, Opp. at 8-10, rests on a partial, and out-of-context, quote from UP's brief to the Arkansas Supreme Court. What UP actually wrote was: "While a ratio of five times the compensatory award is *putatively* within constitutional bounds in a personal injury case, an award of $25 million cannot possibly be squared with the first and third *Gore* criteria." App. at 232 (emphasis added). UP's statement did not represent that the ratio in this case was acceptable, but rather spoke only to what ratios are "putatively" permissible in personal injury cases generally—while simultaneously describing glaring defects in the specific award in this case. UP's extensive briefing of the reprehensibility and comparable penalties guideposts, App. at 227-32, necessarily incorporated the ratio issue as well. Even Respondents recognize that all three *Gore* guideposts are inextricably

intertwined. *See* Opp. at 15 (proper ratio "cannot be resolved without weighing ... all three of the *Gore/State Farm* elements"). And based on those arguments, UP sought vacatur of the award, or remittitur to $100,000—a 0.02-to-1 ratio. App. at 232. Perhaps most tellingly, the Arkansas Supreme Court addressed the ratio guidepost on the merits. Rather than simply dismissing it as waived, the Arkansas Supreme Court tested the 5-to-1 ratio in this case against its understanding of *State Farm*. Pet. App. 33a.[1] It cannot be "sandbagging" to challenge that Court's interpretation of the very case it applied.

In any event, UP amply preserved its federal *claim* in this case—that the jury's punitive damages award violated the Due Process Clause as illuminated by *State Farm*. UP cited *State Farm* and asked that the award be vacated. App. at 232-33. Under well-established law, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992).[2]

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[1] For this reason, respondents' authorities are inapposite. *See United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) (distinguishing cases in which theory presented "was addressed by the court" below); *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (relying on fact that "the highest state court has failed to pass upon a federal question"); *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (considering waiver only where "highest state court is silent on a federal question before us"). The Arkansas Supreme Court spoke not only to the federal claim or question here (whether this award comports with the Due Process Clause) but also to the specific argument: whether a 5-to-1 ratio is consistent with *State Farm* in these circumstances.

[2] *See also Yee*, 503 U.S. at 534 (regulatory taking *argument* not waived, even though not presented below, because petitioner properly preserved *claim* that city ordinance violated the Takings Clause); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (reaffirming *Yee*, and expressing particular reluctance to find waiver where "it appears to us that the [court below] understood the tenor of the argument"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002)(finding "argument" waived only where respondent failed to preserve claim that federal maritime law governed).

2. Respondents strain to minimize the conflict with *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001), Opp. at 10-11. Yet *Exxon Valdez* held that "[t]he test of whether a punitive damages award survives review *cannot be* merely whether there is any evidence to support it," 270 F.3d at 1240, while the Arkansas Supreme Court held the opposite: it could not "substitute [its] judgment for that of the jury when there is basis in the evidence for the punitive award." Pet. App. 36a. Respondents assert that the Arkansas Court was only referencing its state law analysis. Opp. at 10 n.2. But that paragraph immediately follows, and clearly refers to, the Court's federal analysis. By that point in the opinion below, the state law analysis was complete, and the Court had just finished its application of the *Gore* guideposts. Pet. App. 31a-36a. At a minimum, the "basis in the evidence" standard is "interwoven with the [Court's] federal law" analysis. *Arizona v. Evans*, 514 U.S. 1, 7 (1995); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Since it "is not *clear* from the face of the opinion" that this standard is independent of the Court's *State Farm* analysis, it must be presumed to be federal in character. *Id.* at 1041 (emphasis added).

The Arkansas Supreme Court's recitation of the words "*de novo*" does not ameliorate the conflict. The analysis the Arkansas Supreme Court actually performed reveals that it adhered to the "basis in the evidence" standard rather than performing genuine *de novo* review. The Court drew all possible inferences in favor of the Barbers, relying on "facts" completely unsupported by the record (as the dissenting Justices observed) and repeatedly relying on facts the jury *might* have found. *See* Brief for the United States Chamber of Commerce, at 12 & n.5. That is not the exacting *de novo* review required by *State Farm*.

3. The remainder of respondents' punitive damages analysis consists of an effort to transform this Court's acknowledgment that the precise amount of a punitive award must be based on "the facts and circumstances" of

each case, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2002), into an impediment to further guidance from this Court. Opp. at 12-20. This Court has called for "[e]xacting appellate review" of punitive damages awards. 538 U.S. at 418. It follows that whatever "facts and circumstances" might justify a $25 million punitive damages award must be consistent with the principles of *State Farm*. And this Court has granted review several times to illuminate the character of the Due Process standard to be applied in future cases. It should do so here as well.[3]

First, the Arkansas Supreme Court's reprehensibility analysis relies on 20/20 hindsight. Respondents suggest UP recklessly disregarded a known danger, Opp. at 2-3, 12-13, relying on "near misses" never reported to UP, Pet. App. 15a-18a, and "complaints" and "warnings" that hardly differentiate this case from ordinary negligence. Respondents insinuate UP favored its own workers over the motoring public, Opp. at 13, but UP track workers use track machinery that, unlike trains, has no lights and no horns, making flagmen necessary to protect both workers *and* motorists. Respondents' suggestion that UP did nothing to fix the problems at Crossing 123, Opp. at 2, founders on the undisputed fact that UP entered into a contract to have vegetation cleared all along the subdivision. Pet. App. 41a-42a. And the assertion that UP never funded that contract, Opp. at 3, was not adopted by the Court below, presumably because it is contradicted by the record: the contract on its face guarantees payment of almost three-quarters of a million dollars, to be paid as Tweedy Contractors performed work. Add. at 527.

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[3] The spoliation issue, far from creating a vehicle problem, Opp. at 16-18, makes review even more important to close a loophole in *State Farm*. The adverse inference instruction, which respondents characterize as "routine," Opp. at 17, will become ubiquitous once the plaintiffs' bar discovers it can support millions in punitives. Respondents offered no rebuttal to petitioner's cases holding that the inference calls for raw speculation, which then defeats appellate review.

Despite respondents' protests, the Barbers emphatically did "urge the jury to hold Union Pacific 'accountable for what it's doing across the country.'" Opp. at 19. Dr. Levine did not confine his nation-wide and industry-wide observations to his "credentials," Opp. at 19 n.10, but also incorporated them into his "expert" opinion. He expressly testified as to UP's "overall policy" and UP's "part [in] an industry-wide policy also." App. at 127. He opined generally as to all railroads' responsibility for upgrading crossings. App. at 130. He relied heavily on UP's national claims manual, even extracting the conclusion that UP's budget called for killing Arkansans. App. at 131-33. And on cross he revealed that he is "critical of Union Pacific for not spending enough money on grade crossing safety, because *I have no evidence that they'd spend enough.* I criticize *all the of the railroads* for not spending enough money." App. at 136 (emphasis added). The jury that heard Dr. Levine, and the Court that repeatedly invoked his opinion, flatly ignored *State Farm*'s prohibition on extraterritorial punishment.

Second, the Court's interpretation of the ratio guidepost conflicts both with *State Farm* and a recent decision of the Eighth Circuit. Conceding that the Arkansas Supreme Court did not even acknowledge *State Farm*'s guidance on 1-to-1 ratios, respondents rest on their theme that punitive damages are fact-specific determinations. Opp. at 14-15.[4] However, the "facts and circumstances" identified by respondents are the same facts used to justify the imposition of punitive damages *at all*. *Compare* Opp. at 14, *with* Pet. App. at 24a-29a. Petitioner never suggested that

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[4] Respondents' theory that cases involving facts are not suitable for certiorari reaches its most absurd with the assertion that reviewing prior decisions for compliance with *State Farm*'s ratio guidance is "of no assistance." Opp. at 14 n.6. *State Farm* clearly contemplated that 1-to-1 ratios would be the norm in cases with substantial compensatory damages. 538 U.S. at 425. If reviewing courts find "facts and circumstances" sufficient to disregard *State Farm* thirty out of thirty-one times, *see* Pet. at 15 & n.8, that strongly suggests the lower courts are consistently misunderstanding the fact-specific inquiry.

the 1-to-1 principle overrides all other considerations. But if that portion of *State Farm* means anything at all, it must surely mean that where compensatory damages are substantial, 1-to-1 is the presumptive cap and a higher award requires "facts and circumstances" well beyond those needed to support the imposition of punitive damages at all. At a 1-to-1 ratio, UP would still pay $5 million in compensatory damages and $5 million in punitives. Respondents nowhere explain how the facts they point to—Mr. Barber's injuries and UP's failure to improve Crossing 123—justify an *additional* $20 million.

The Arkansas Supreme Court's decision also conflicts with a recent opinion of the Eighth Circuit. In *Conseco Fin. Servicing Corp. v. North Am. Mortgage Co.*, ___ F.3d ___, No. 03-1443, 2004 WL 1907796, *1 (8th Cir. Aug. 27, 2004), the jury awarded $3.5 million in compensatory and $18 million in punitive damages in an unfair competition case. The Eighth Circuit (which includes Arkansas) found sufficient reprehensibility to support the award, *id.* at *11, and found the third guidepost inapplicable due to an absence of comparable penalties. *Id.* at *9 n.11. The Eighth Circuit nevertheless reduced the punitive award from a 5.4-to-1 ratio to a 2-to-1 ratio, invoking *State Farm*'s guidance that substantial compensatory awards presumptively call for ratios at or near 1-to-1, and reasoning that "because Conseco received a large compensatory award in this case—$3.5 million—in the 'absence of extremely reprehensible conduct against the plaintiff or some special circumstance' the large exemplary award cannot stand unmodified." *Id.* at *10. Thus, had this case been tried in federal court in Arkansas, even by the identical jury, UP's due process rights would have been protected by genuine scrutiny of the punitive award, taking seriously this Court's directive that ratios at or near 1-to-1 are required when compensatory damages are substantial. *See also Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004) (reducing punitive award from $6 million to $600,000, on compensatories of $600,000).

Plaintiffs' forum selection here was outcome determinative, subjecting UP to a rule of law that approves 5-to-1 ratios reflexively. Pet. App. 33a.[5]

Third, the Court's interpretation of the third guidepost conflicts both with *State Farm* and with the Eleventh Circuit's decision in *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999). *State Farm* requires an assessment of the legislative penalty that is realistic, not wild speculation about the maximum penalty a regulator could possibly impose. And *Combustion Engineering* used as its baseline the fine actually imposed, even though Georgia's statute provided for "civil fines of up to $100,000 per day." 170 F.3d at 1337. Respondents attempt to distinguish *Combustion Engineering* as only calling for comparison to the "penalty ... imposed in this specific case." Opp. at 11. That reading only sharpens the conflict. In this case the relevant regulators, despite having a statutory penalty at their disposal, elected to impose no penalty whatever. Under respondents' view of *Combustion Engineering*, then, the proper baseline for comparison here is zero. At most, the proper baseline is the penalty FRA has imposed in comparable cases. Either way, the Arkansas Supreme Court radically misjudged the baseline against which it was to test the jury's punitive damages award. Certainly *Combustion Engineering*'s later conclusion—that a 435 to 1 ratio of punitives to legislative penalties is acceptable, *see* Opp. at 11-12, 15-16—is at odds with *State Farm*'s principles. That, however, is simply another reason to grant review in this case: even courts that select a proper baseline under the third guidepost have not applied that guidepost to meaningfully constrain awards.

4. Contrary to respondents' arguments, Opp. at 20-27, the preemption question is certworthy for two reasons. *First*, the opinion below conflicts with this Court's decisions

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[5] Plaintiffs defeated removal here by naming L.E. Piper, Jr., the train engineer. Pet. App. 2a. Mr. Piper was an Arkansas resident. Tr. at 6058. The jury found for Mr. Piper on all counts. Pet. App. 5a.

in *Maryland v. Baldwin*, 112 U.S. 490 (1884), as well as *Felder v. Casey*, 487 U.S. 131 (1988), and their progeny. *See* Pet. at 28-30.[6] *Second*, the judgment below frustrates rail policy by permitting massive damages for conduct that conforms to federal safety standards.

UP made this argument abundantly clear—both in the trial court and on appeal. The Arkansas Supreme Court twice recognized that UP asserted a preemption objection to the slow order evidence. *See* Pet. App. 4a, 5a. Consistent with Ark. S. Ct. R. 4-2(7), *cited in* Opp. at 23, UP introduced the issue with the heading "*Federal Law Preempts* The Claim Of Negligent Failure To Issue A Slow Order." App. at 222 (emphasis added); *see also* Reply Brief at 5 (same). UP extensively discussed *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658 (1993), and other preemption cases, repeatedly explained why the slow order question was categorically preempted, and at *no* point discussed the sufficiency of evidence to support the slow order theory. Not only UP's claim, but even its precise arguments were extensively preserved below, and any confusion in the opinions below cannot be attributed to UP's briefing.

Respondents' defense of the Arkansas Court's standard of review merely repeats the Court's mistake.[7] Although a

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[6] Respondents' citation to *Griffin v. United States*, 502 U.S. 46 (1991), could not be more inapposite. *Griffin* was a criminal case that did not purport to overrule (indeed did not even cite) the *Baldwin* line of cases that govern civil actions. Moreover, *Griffin* holds that even in a criminal case, where "jurors have been left the option of relying upon a *legally* inadequate theory," reversal is mandatory. *Id.* at 59.

[7] Continuing their theme that all difficult arguments must have been waived, respondents claim that UP waived the argument that *Baldwin* controls. Opp. at 25. The first time that argument came into play was after the decision of the Arkansas Supreme Court. Respondents never argued that the rule of *Union Pacific R.R. Co. v. Sharp*, 952 S.W.2d 658 (Ark. 1997), required affirmance of the jury's verdict even if the slow order theory was preempted. The *first* time that assertion was made was in the Arkansas Supreme Court's opinion, and UP promptly moved for reconsideration, citing *Felder* and its progeny. Likewise, UP did not waive the argument that the "slow order" theory invalidated the punitive

rule "concerning appellate review of *evidentiary* challenges" might not ordinarily burden federal rights, Opp. at 26 n.15, when that rule is applied to permit the jury to consider an *entire theory of liability* that is preempted by federal law it most certainly does. The trial court recognized that this jury was told that UP negligently failed to order its trains to run slower than the federally approved speed limit and "obviously ... if they found that to be so, I assume that they would consider that ... on the punitive damages issue." App. at 207. Even the Arkansas Supreme Court incorporated speed into its punitive damages calculus, holding that recklessness could be inferred because UP "knew or ought to have known ... that allowing the vegetation to remain overgrown and allowing trains to pass through Crossing 123 *at close to sixty miles per hour* would naturally or probably result in injury." Pet. App. at 28a-29a (emphasis added). Respondents do not—indeed cannot—deny that this state jury likely fined UP $25 million for conduct protected by preemptive federal law.

To escape the obvious conclusion—that the jury's verdict must be vacated—respondents conjure an alternative theory: that slow orders would be relevant as circumstantial evidence that UP knew its track was in poor shape. Opp. at 21-23. Yet respondents—normally quite sensitive to waivers—never argued this theory below, never got a ruling adopting it, Opp. at 22 (trial court ruling "concededly opaque"), and never briefed it to the Arkansas Supreme Court. Brief of Appellee at 9-11 (arguing only that failure to issue a slow order creates negligence liability). In any event, respondents cannot seriously contend that the jury would have known to consider the slow order evidence only as circumstantial proof of track condition, Opp. at 22, given that the trial judge (and counsel for the Barbers) both seemed to believe that *Easterwood* would permit a finding

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damages award. Opp. at 18 n.9. UP advised both courts that the slow order theory was preempted, and that *State Farm* did not permit Arkansas to punish conduct over which it lacked jurisdiction.

of negligence for failure to issue a slow order.[8]

5. In the alternative, if this Court reviews or summarily reverses the decision of the Utah Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell*, (*State Farm II*),[9] petitioner respectfully suggests that this case be held for a grant, vacate, and remand order. Because the decision in this case relied heavily on *State Farm I*, any further developments in that case will inexorably "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). In particular, the Utah Supreme Court defied this Court's determination that a 1-to-1 ratio was appropriate in light of the substantial compensatory damages. Petitioners in *State Farm II* have asked this Court to make clear that *State Farm I* meant what it said, and any such clarification will necessarily implicate this case. Moreover, petitioners in *State Farm II* present issues concerning the use of punitive damages to punish a defendant "for its litigation conduct," *State Farm* Pet. at 20-24, as well as proper interpretation of the third guidepost, *id.* at 28-30. Any additional guidance this Court provides regarding *State Farm* will necessarily have a direct bearing on the decision in this case, and thus would warrant a GVR.

CONCLUSION

This Court should grant plenary review or summarily reverse. In the alternative, it should hold this case to be vacated and remanded in light of any decision in *State Farm II*.

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[8] Respondents' arguments notwithstanding, Opp. at 21 n.11, *Easterwood* unambiguously preempted the slow order theory. *See* Brief of Association of American Railroads at 16 n.10.

[9] State Farm sought certiorari on July 20, 2004. *See* Petition for a Writ of Certiorari, *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 04-116. ("*State Farm* Pet."). *State Farm II* is on the September 27, 2004 conference list.

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE AMERICAN TORT REFORM ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the American Tort Reform Association and the National Association of Manufacturers request leave to file the accompanying brief as *amici curiae* in support of the Petition for a Writ of Certiorari.[1] While the

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[1] In accordance with Rule 37.6, *proposed amici* state that no counsel for either party has authored this brief in whole or in part, and no person

Petitioner has consented to the filing of this brief, Respondents' counsel has withheld consent, necessitating the filing of this motion.[2]

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before this Court that have addressed important liability issues.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

This case is of interest to proposed *amici* because it provides a sound vehicle for this Court to address the improper use of wealth evidence in the assessment of punitive damages awards. In the instant case, the $9.6 billion net worth of petitioner-defendant Union Pacific Railroad Co. was the ***only*** evidence offered during the punitive damages phase of trial on non-fatal personal injury negligence claims arising out of

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or entity, other than the proposed *amici*, has made a monetary contribution to the preparation or submission of this brief.

[2] Petitioner's letter of consent has been lodged with the Clerk of the Court.

a railroad crossing accident. Thus, this case crystallizes the ongoing debate about the constitutional due process issue presented by the use of evidence of a defendant's wealth in assessing the amount of punitive damages.

Distinguished judges and scholars have grappled for years with the problems and perceived benefits created by this so-called "traditional" measure of punitive awards. This issue is only becoming more pressing in light of modern mass tort litigation and punitive damages practice and their effects on consumers and businesses throughout the United States. This case provides a unique opportunity for this Court to provide clear guidelines on an important issue – the extent to which evidence of a corporate defendant's wealth can be used to measure an award of punitive damages without violating constitutional due process guarantees.

Particularly in light of the emphasis on the petitioner-defendant's wealth in this case, it is important for this Court to grant certiorari to address the failure by the courts below to comply with this Court's directives regarding the improper use of extraterritorial evidence to support punitive awards in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). Both the trial court and the Arkansas Supreme Court relied on Union Pacific's alleged nationwide policies to put profits over safety when upholding the punitive award. This is in direct contravention of this Court's ruling in *Campbell* that "a State cannot punish a defendant for conduct that may have been lawful where it occurred. Nor does the State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction." 538 U.S. at 421-22.

This Court has expressed heightened concern about the use of wealth evidence in cases where, as here, "the decisionmaker is presented . . .with evidence that has little bear-

ing as to the amount of punitive damages that should be awarded." *Id.* at 418 (noting in such cases that strong guidelines are needed to "aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.").

The proposed *amici* are active in the business and manufacturing communities and their members are the primary victims of excessive punitive damages awards. They, and their members, have a unique understanding of the impact of excessive punitive damage awards inflated by the ill-advised use of wealth evidence.

For the foregoing reasons, the proposed *amici* are well-suited to bring these matters to the Court's attention. Accordingly, ATRA and the NAM respectfully request that the Court grant its motion for leave to file the attached brief.

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On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

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BRIEF *AMICI CURIAE* OF AMERICAN TORT REFORM ASSOCIATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 busi-

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[1] *Amici's* motion for leave to file this brief *amici curiae* is filed simultaneously with the brief. No counsel for either party has authored this brief in whole or in part, and no person or entity other than the *amici* has made a monetary contribution to the preparation or submission of this brief.

nesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

This case is of interest to *amici* because it provides a sound vehicle for this Court to address the improper use of wealth evidence in the assessment of punitive damages awards. The members of *amici* are active in the business and manufacturing communities and their members are the primary victims of excessive punitive damages awards. Ultimately, the impact of runaway punitive damages awards is felt by the consumer who purchases goods and services. *Amici* have a unique understanding of the impact of excessive punitive damage awards inflated by the ill-advised use of wealth evidence.

STATEMENT OF THE CASE

Amici adopt and incorporate Petitioners' statement of the case.

SUMMARY OF ARGUMENT

This case crystallizes the ongoing debate about the constitutional due process issue presented by the use of evidence of a defendant's wealth in assessing the amount of punitive damages. Distinguished judges and scholars have grappled for years with the problems and perceived benefits created by this so-called "traditional" measure of punitive awards. This issue is only becoming more pressing in light of modern mass tort litigation and punitive damages practice and their effects on consumers and businesses throughout the United States. This case provides a unique opportunity for this Court to provide clear guidelines on an important issue – the extent to which evidence of a corporate defendant's wealth can be used to measure an award of punitive damages without violating constitutional due process guarantees.

Particularly in light of the emphasis on the petitioner-defendant's wealth in this case, it is important for this Court to grant certiorari to address the failure by the courts below to comply with this Court's directives regarding the improper use of extraterritorial evidence to support punitive awards in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

For these reasons, the Petition for Writ of Certiorari should be granted.

ARGUMENT

I. INTRODUCTION

This case puts squarely before this Court the constitutional limits for the use of evidence of a corporate defen-

dant's wealth in measuring a punitive damages award. In the instant case, the $9.6 billion net worth of petitioner-defendant Union Pacific Railroad Co. was the ***only*** evidence offered during the punitive damages phase of trial on non-fatal personal injury negligence claims arising out of a railroad crossing accident. An Arkansas jury awarded $5 million in compensatory and $25 million in punitive damages, a 5:1 ratio. The trial court denied the petitioner-defendant's motion for remittitur, explaining that $9.6 billion "is an awful lot of wealth" and you "have to look at [that]." *Ruling on Post-Trial Motions*, Petitioner's Abstract at 48a-49a. The Supreme Court of Arkansas also referenced petitioner-defendant's net worth in upholding the punitive award, stating "there is no doubt that [petitioner-defendant] is in a strong financial and social condition" and that the award constituted only 0.260 percent of its net worth. *Union Pac. R.R. Co. v. Barber*, No. 03-57, *slip op.* at 30 (Ark. Feb. 26, 2004), *available at* 2004 WL 352525; Pet. Abst. at 30a.

In light of the emphasis placed on Union Pacific's net worth, this case also cries out for this Court to enforce its ruling in *Campbell* barring use of out-of-state conduct in setting punitive awards. As well as citing petitioner-defendant's wealth, both the state supreme court and the trial court explained the $25 million punitive award was justified based on proof of petitioner-defendant's alleged participation in an *industry-wide* national "policy" that "put company profits before public safety." *Barber*, *slip op.* at 30, Pet. Abst. at 30a; *see also Ruling on Post-Trial Motions*, Pet. Abst. at 48(a) (trial court explains its reliance on "the proof throughout the trial of concerning policies of the railroad company and their actions."). Evidence admitted to establish this alleged corporate policy during the liability phase of trial included, *inter alia*, expert testimony regarding general railroad industry policies and opinions based on petitioner-defendant's ***national*** filings with government agencies and

policy documents. *See* Pet. Abst. at 42, 126-27, 134, 136. This is precisely the same type of national policy evidence that this Court barred in *Campbell*. It should not have been used to uphold the punitive damages award here.

II. THIS COURT SHOULD PROVIDE GUIDANCE ON THE CONSTITUTIONAL LIMITS OF THE USE OF WEALTH EVIDENCE TO SET PUNITIVE DAMAGES AWARDS.

This Court repeatedly has been asked to reject the use of evidence of a defendant's wealth in the consideration of punitive damages awards. *See, e.g., TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

While thus far declining to hold this use of wealth evidence to be unconstitutional *per se*, this Court and its Members also repeatedly have emphasized the problems inherent in allowing a jury to consider a company's wealth when determining punitive damages: the likelihood of juror bias against large corporations, especially those from out of state;[2] juror attempts at social engineering through the redistribution of wealth from corporations to relatively poorer individuals;[3] unpredictable "windfall" verdicts;[4] and the poten-

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[2] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) ("[T]he presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.") (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994)); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 464 (1993) (agreeing that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident").

tial imposition of undue burdens on interstate commerce and other societal interests.[5]

In light of these very real problems, it would be helpful if this Court could provide specific guidelines on how wealth evidence can be used consistent with constitutional due process protections, if at all. In this case – given that Union Pacific's net worth was the only evidence introduced during

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[3] *TXO*, 509 U.S. at 468 (Kennedy, J., concurring in part and concurring in the judgment) (noting that juries bedazzled by evidence of the size and financial condition of a wrongdoer and feeling "antipathy to a wealthy, out-of-state corporate defendant" may surrender to "redistributionist impulses"); *id.* at 490 (O'Connor, J., dissenting) ("jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously large pool of wealth"); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (jurors, if not properly guided, may "target unpopular defendants ... and redistribute wealth").

[4] *TXO*, 509 U.S. at 490 (O'Connor, J., dissenting) (jury instructions afforded only two objective bases for determination of punitive damages: actual harm, "a relatively small sum on which the jury obviously did not rely," and defendant's wealth, "a factor that obviously impressed the jury a great deal," thus "ensur[ing] that a windfall verdict would result by inviting the jury to redistribute wealth to respondents ... based solely on [defendant's] financial position."); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270-71 (1981) (finding "no compelling reason" to allow punitive damages in Section 1983 cases against municipalities; juror awareness of "the unlimited taxing power of a municipality" may prejudicially impact the size of the award and "the impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial").

[5] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996) ("The fact that BMW is a large corporation ... does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce."); *accord Fact Concerts*, 453 U.S. at 267 ("punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort.").

the punitive phase of trial – wealth evidence was clearly given the maximum role possible. Absent clear guidelines from this Court, evidence of a defendant's financial condition will be used as "an open-ended basis for inflating awards when the defendant is wealthy." *BMW of N. Am. v. Gore*, 517 U.S. 559, 596 (1996) (Breyer, J., concurring).

A. *Use of Wealth Evidence Inevitably Arouses the Passion and Prejudice of the Jury.*

As the Court has observed, "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (footnote omitted). At the same time, the prejudicial impact of evidence of a defendant's wealth on a jury has long been recognized. *See Washington Gas-Light Co. v. Lansden*, 172 U.S. 534, 556 (1899) (reversing verdict rendering compensatory award for which multiple defendants were jointly and severally liable; to do otherwise "might work injustice" as trial court failed to limit use of evidence of sole corporate defendant's wealth to punitive damages issues). In 1931, Professor Clarence Morris, then a Brandeis Research Fellow at Harvard University, wrote:

> The theory is that a penalty which would be sufficient to reform a poor man is likely to make little impression on a rich one; and therefore the richer the defendant is the larger the punitive damage award should be. But it is probable that this very evidence, instead of aiding the jury to assess a proper verdict, may prejudice them against the defendant and prevent an impartial judgment, not only on the size of the verdict, but in deciding who shall win the case. It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such

> evidence may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function.

Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931).

Professor Morris made his prescient comments when punitive damages claims still were brought predominantly against defendant *individuals* for their intentional bad acts toward a specific person, such as assault and battery. Since then, fundamental changes in tort law and punitive damages practice beginning in approximately the 1960s have led to an explosion of punitive damages claims against *businesses* in interstate commerce.[6] As explained by Justice O'Connor, corporations are particularly vulnerable to the misuse of wealth evidence:

> Corporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. More-

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[6] Such changes in punitive damages practice included the expansion of the remedy to conduct that was not intentional in nature, such as recklessness, willful and wanton misconduct, or even gross negligence, facilitating their award in mass tort litigation. *See* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That has Outlived Its Origins*, 37 Vill. L. Rev. 1117, 1130-38 (1984) (discussing standards of conduct giving rise to punitive damages award). The focus of punitive damages also shifted away from the defendant's alleged wrongful conduct toward the actual plaintiff to its misconduct toward the public at large. For example, while it was difficult to prove a defendant manufacturer marketed and sold a defective product with the conscious intent of injuring a specific plaintiff, it was much easier to establish that the defendant did so recklessly in disregard to the possible harm to potential consumers. *See, e.g., Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 715 (1967) (plaintiff need not prove defendant acted with deliberate intent to harm plaintiff; plaintiff merely had to prove that the defendant acted recklessly and in wanton disregard to the possible harm to others when it marketed, promoted and sold the prescription drug at issue).

> over, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth. Finally, juries may feel privileged to correct perceived social ills stemming from unequal wealth distribution by transferring money from "wealthy" corporations to comparatively needier plaintiffs.

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 464 (1993) (O'Conner, J., dissenting). *See* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that has Outlived its Origins*, 37 Vand. L. Rev. 1117, 1148 (1984) ("Permitting the fact finder to consider evidence of a wrongdoer's wealth is really nothing more than a camouflaged mechanism designed to encourage large punitive assessments. In essence, it is a procedural device that promotes the redistribution of wealth in society.").

The changes in tort law and punitive damages practice made business defendants vulnerable to bankrupting punitive awards in situations where defendant individuals generally were not. These include strict products liability cases, which do not require any misconduct whatsoever by the defendant to establish liability,[7] and the repeated imposition of multiple punitive damages for a single misstep.[8] And while emphasizing the wealth of defendant individuals and businesses

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[7] *See id.* (*Toole* was the first case to find that punitive damages are recoverable in a strict product liability action). Since then, punitive damages awards in product liability cases have proliferated.

[8] As one commentator wrote, "[A] single design error, inadequate warning or recurrent manufacturing mistake can permeate an entire product line, resulting in tens, hundreds or thousands of personal injury lawsuits with accompanying punitive damages claims. Individual awards that appear reasonable can aggregate to threaten the very survival of a business entity." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 142 (1986).

equally upsets the "theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice," *Laidlaw v. Sage*, 158 N.Y. 73, 103 (1899), allowing wealth evidence to inflate punitive damages awards against corporate defendants also has adverse practical effects on society.

As plaintiffs' lawyers became more likely to seek punitive damages from corporate defendants perceived to have "deep pockets,"[9] the size and frequency of punitive damages awards "increased dramatically"[10] and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."[11] Now, multi-million dollar and even billion-dollar punitive damages verdicts have become commonplace.[12] Numerous companies have been

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[9] Ford Motor Company, for example, reported that less than 0.5% of the products liability complaints filed against it prior to 1970 contained claims for punitive damages, while 27.1% of all such complaints in 1980 sought punitive awards. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 54 n.258 (1982). If only personal injury lawsuits are considered, the 1980 percentage is higher. *Id.*

[10] George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982).

[11] Jeffries, 72 Va. L. Rev. at 142. *See also* Peter W. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); Walter K. Olson, THE LITIGATION EXPLOSION (1991); Stephen M. Turner, et al., *Punitive Damages Explosion: Fact or Fiction?* (Wash. Legal Found., Working Paper Series No. 50, Nov. 1992).

[12] This dramatic increase has led one commentator to suggest that "[p]unitive damages have replaced baseball as our national sport." Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, Wall St. J., Oct. 5, 1994, at A17. *See* Malcom E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 Ala. L. Rev. 919, 919 (1989) ("Today, hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case.") (cited by O'Connor, J., dissenting, in *Haslip*, 499 U.S. at 62); Philip Borowsky &

driven into bankruptcy or have been forced to close plants, lay off workers and stop research and production of promising products as a result of excessive punitive damages awards.[13] The ripple effects reach far into a community, adversely affecting other businesses and individuals that rely on the defendant company, shareholders and pension plan investors, and others.

B. Evidence Of The Wealth Of The Defendant Does Not Further The Purposes of Punitive Damages Awards.

Punitive damages are not ordinary civil or tort law damages.[14] Unlike compensatory damages, which provide payment for economic losses (e.g., lost wages and medical expenses) and noneconomic injuries (e.g., "pain and suffering"), punitive damages are not awarded to compensate for a harm.[15] Rather, punitive damages are "quasi-criminal" in

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Jay Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L. Rev. 147, 150 (1983) (noting trend of "juries . . . award[ing] substantial punitive damages with increasing frequency").

[13] *See, e.g.*, Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L. Rev. 33, 36-37 (2003) ("catastrophic" effects of asbestos litigation and its accompanying punitive awards include about "seventy companies ... bankrupted, thousands of jobs lost, employee 401(k) plans decimated, and billions of dollars lost to investors"); Bruce N. Kuhlik & Richard F. Kingham, *The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability*, 45 Food Drug Cosm. L. J. 693 (1990) ("There is a growing body of evidence that the threat of punitive damages deters the development and marketing of beneficial products.").

[14] *See* Victor E. Schwartz et al., Prosser, Wade and Schwartz's Cases and Materials On Torts, 549-50 (10th ed. 2000).

[15] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (noting that punitive damages "are not compensation for injury ... [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *see also* W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 2, at 9 (5th ed. 1984) (explaining that pu-

nature and "operate as 'private fines' intended to punish the defendant and deter future wrongdoing."[16] Punitive damage awards serve an important social purpose. They allow the public to express its outrage, to punish defendants for reprehensible conduct, and to deter such conduct in the future, where compensatory damages alone in some instances may not adequately serve these objectives.[17]

The criminal law seeks to serve the same purposes as punitive damages: punishment and deterrence. With minor exceptions not relevant here, the criminal law focuses on the wrongdoing of the defendant, not his or her wealth; "a defendant's socio-economic status is never relevant to sentencing." *United States v. Burgos*, 276 F.3d 1284, 1291 (11th Cir. 2001) (quoting *United States v. Burch*, 873 F.2d 765, 769 (5th Cir. 1989); *see* United States Sentencing Commission, *Guidelines Manual*, §5H1.10 (Nov. 2002) (defendant's socio-economic status is "not relevant in the determination of a sentence"). This is true from crimes as minor as a speeding ticket to those as serious as drug dealing. The penalty will focus on how fast the defendant was speeding, not on the size of his pocket book. It will focus on the scope and frequency of the drug dealing, not the wallet size of the dealer.

Members of this Court and other distinguished experts have concluded that the assessment of punitive damages based on the wealth of a defendant – particularly a corporate defendant – actually retards, rather than advances, the re-

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nitive damages are awarded to punish defendant, teach defendant not to "do it again," and deter others from similar behavior).

[16] Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001) (quoting *Haslip*, 499 U.S. at 19).

[17] *See* Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 50 Hastings L.J. 969, 978-79 (1999).

tributive and deterrent purposes served by this remedy.

A well-respected legal and economics scholar at the Harvard Law School, W. Kip Viscusi, has closely studied the extent to which punitive damages work to deter risky behavior.[18] He concluded that "[s]tates with punitive damages exhibit no safer risk performance than states without punitive damages" and that "there is no deterrence benefit that justifies the chaos and economic disruption inflicted by punitive damages."[19] One reason, he found, is that "when firms look forward, the prospect of punitive damages is so uncertain that there is no deterrent effect."[20] Professor Viscusi also found that jurors base their punitive damage awards less on the defendant's conduct and instructions from the court than on amounts suggested at trial, thus highlighting the impact of emphasizing the defendant's wealth in the jury's consideration of damages.[21] Indeed,

> [t]he degree of admonition – the amount of the judgment in relation to the [defendant's] means – is not ... tied to any concept of what is necessary to deter future conduct nor is there even any way to determine that the jury has considered the culpability of the conduct involved in the particular case.

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[18] *See, e.g.*, W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations*, 87 Geo. L.J. 285 (1998) [hereinafter "Social Costs of Punitive Damages"]; W. Kip Viscusi, *Why There is No Defense of Punitive Damages*, 87 Geo. L.J. 381 (1998) [hereinafter "No Defense of Punitive Damages"].

[19] Viscusi, *Social Costs of Punitive Damages*, at 287, 298.

[20] Viscusi, *No Defense of Punitive Damages*, at 383.

[21] *See* W. Kip Viscusi, *Punitive Damages: How Jurors Fail to Promote Efficiency*, 39 Harv. J. on Legis. 139, 160-63 & n.90 (2002) (finding that providing a jury with an "anchor" value for punitive damages based on a defendant's net worth led to a ten-fold increase in punitive damages).

> Thus the essence of the discretion is unpredictability and uncertainty.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 85 (1971) (Marshall, J., dissenting); *cf. Fact Concerts*, 453 U.S. at 268-69 ("it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality ... the impact on the individual tortfeasor of this deterrence in the air is at best uncertain.").

Proponents of wealth evidence typically argue that it is important to consider in order to assess a large enough punitive award to get the attention of the defendant and deter future misconduct. *See, e.g., Suzore v. Rutherford*, 251 S.W.2d 129, 131 (Tenn. App. 1952) ("what would be 'smart money' to a poor man would not be, and would not serve as a deterrent, to a rich man"). Justice O'Connor recognized in her dissent in *TXO* the possibility that some "might hypothesize that a particularly sophisticated jury would realize that imposing damages in an amount linked to potential harm or the defendant's expected gain might provide appropriate deterrence." *TXO*, 509 U.S. at 486-87.

While this may make sense in determining the appropriate level of punishment for an individual defendant (and it is not clear that it would),[22] commentators are virtually unanimous in the view that a corporate defendant's wealth has no rational connection to the setting of an appropriate penalty. *See, e.g.*, Kenneth Abraham & John C. Jeffries, *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. Legal Stud. 415, 421-22 (1989); Robert D.

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[22] *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508-09 (7th Cir. 1992) (Easterbrook, J.) ("'May' ... is an important qualifier; the entire penalty includes extra-judicial consequences, such as a loss of business and other future income, that is likely to be greater for wealthier defendants.").

Cooter, *Punitive Damages for Deterrence: When and How Much*, 40 Ala. L. Rev. 1143, 1176-77 (1989); *Symposium Discussion, Punitive Damages*, 56 S. Cal. L. Rev. 155, 190-91 (1982) (comments by Professors Jack L. Carr and Malcolm E. Wheeler).

This is why. "Corporations ... are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business." *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.). "Corporations as such feel no utility or disutility associated with increases or decreases in wealth." Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 Ala. L. Rev. 741, 824-26 (1989). In reality, investors, including individual investors and pension trusts and mutual funds that aggregate the investments of millions of average persons, are the true payors of punitive awards as they see the value of their shares decrease. *Zazu Designs*, 979 F.2d at 508.

Professor Viscusi has taken a similar view:

> Corporate entities are not children or criminals who need to be punished. They are institutions. Punitive damages inflict harm on current shareholders, customers, and employees. None of these individuals may have even been involved in the original safety decision. For long-term risks, such as asbestos, the economic players today are quite different from those who made the risk decisions decades ago at the time of exposure. Even for contemporaneous risks, it is not easy to locate the responsible employee for a large institution's actions. Even if the responsible employee is identified, that individual will not suffer the full effects of the punitive damages award. The employee can simply quit his job, thus limiting the institution's ability to sanction him.

> The result is that innocent people who are not responsible for the risk decision nonetheless will suffer the economic sanction.

W. Kip Viscusi, *Why There is No Defense of Punitive Damages*, 87 Geo. L.J. 381, 383 (1998) (internal citation omitted). As a result, "a corporation's wealth is not a meaningful proxy for the wealth of its ultimate owners who are the real principals in the principal-agent relationship." Chapman & Trebilcock, 40 Ala. L. Rev. at 824-25. Jurors, however, are not told this

Moreover, corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. "Net worth is a measure of profits that have not yet been distributed to the investors. Why should damages increase because the firm reinvested its earnings?" *Zazu Designs*, 979 F.2d at 508. The absolute size of a corporate defendant is also a questionable reason to inflate punitive awards:

> Awards of ordinary damages in [individual cases] deter wrongful conduct. The net judgment bill of the firm will increase with its wrongs, without the need for punitive damages. If a larger firm is more likely to commit a wrong on any given transaction, then its total damages will increase more than proportionally to its size without augmentation in any given case; if a larger firm is equally or less likely to commit a tort per transaction, then the court ought to praise the managers rather than multiply the firm's penalty. Consider: General Motors is much larger than Chrysler, and so makes more defective cars, but the goals of compensation and deterrence are achieved for both firms by awarding as damages the injury produced per defective car.

Id. at 508-09.

In sum, in light of the societal problems caused by punitive damages "run wild"[23] under 21st Century punitive damages practice, "tradition" seems a weak rationale for allowing the unrestrained use of wealth evidence to influence the amount of punitive damages awards – particularly in light of scholarship showing that use of wealth evidence fails to further the purpose of punitive damages awards. Admittedly, excessive punitive damages have not been caused exclusively by the use of wealth evidence. This Court, though, already has set forth clear constitutional guidelines addressing other contributing factors, such as the inappropriate use of out-of-state conduct and conduct towards others, lack of proportionality, failure to provide adequate judicial review, and the like. *See Campbell*, 538 U.S. 408; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Gore*, 517 U.S. 558; *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Similar clear and understandable guidelines are sorely needed with regard to the use of wealth evidence.

III. CERTIORARI IS NECESSARY TO ENFORCE THIS COURT'S RULE BARRING CONSIDERATION OF OUT-OF-STATE CONDUCT IN AWARDING PUNITIVE DAMAGES.

This Court explained in *Campbell* that when wealth evidence is introduced on punitive issues:

> our concerns are heightened when the decision-maker is presented ... with evidence that has little bearing as to the amount of punitive damages that should be awarded.

Campbell, 538 U.S. at 418 (noting in such cases that strong

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[23] *Haslip*, 499 U.S. at 18.

guidelines are needed to "aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.").

That is precisely what occurred in this case. In an attempt to establish culpability, plaintiffs launched a broad attack on nationwide corporate "policies" of Union Pacific (and the entire railroad industry) to put profits over safety. *See* Pet. Brief at 4-5. In other words, just as in *Campbell*, "this case was used as a platform to expose, and punish, the perceived deficiencies of [defendant's] operations throughout the country." 538 U.S. at 421. This "scheme" argument is available, at least in theory, in virtually any case against a business defendant. Since corporations owe their shareholders a fiduciary duty to try to make profits, it should surprise no one that many of their activities in our free enterprise system are aimed at furthering that objective. Under *Campbell*, of course, this type of argument is prohibited. *Id.* at 421, 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

Unfortunately, both the trial court and the Arkansas Supreme Court relied on Union Pacific's alleged nationwide "policies" when upholding the punitive award. Each ruling by itself makes it clear that Union Pacific "was being condemned for its nationwide policies rather than for the conduct directed toward the [plaintiffs]." *Id.* at 421-22. The trial court explained that its decision relied on the proof of these "policies" admitted throughout trial. *See Ruling on Post-Trial Motions*, Pet. Abst. at 48(a). The Arkansas Supreme Court explained that it found that the element of "malicious intent" required to support punitive damages under Arkansas law was satisfied by "the record in this case [which] reflects the development of a corporate policy at Union Pacific that put company profits before public safety." *Barber, slip op.* at 30, Pet. Abst. at 30a. This alleged corpo-

rate policy was supported by expert opinion testimony, *id.*, which was based on information about railroad industry practices generally, as well as national information specific to Union Pacific.

This is in direct contravention of this Court's ruling in *Campbell* that "a State cannot punish a defendant for conduct that may have been lawful where it occurred. Nor does the State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction." 538 U.S. at 421-22. While the Arkansas Supreme Court purported to apply *Campbell* in its reprehensibility analysis, *see id.* at *12, it ignored this Court's directives about punishing a defendants for its extra-territorial conduct. To avoid injustice in this case and send a message to courts that may misunderstand the directives in *Campbell*, this Court should grant the Petition for Certiorari.

CONCLUSION

For the foregoing reasons, *amici curiae* the American Tort Reform Association and the National Association of Manufacturers request that this Court grant the Petition for a Writ of Certiorari in this action.

Respectfully submitted,

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No. 04-47

IN THE
Supreme Court of the United States

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

CHRIS BARBER *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Arkansas Supreme Court erred when it held—in conflict with the standards established by this Court and other lower courts—that the punitive damages award conformed to due process.

2. Whether the Arkansas Supreme Court violated the Supremacy Clause when it held—in conflict with the rule followed by this Court and the Courts of Appeals for over a century—that it could affirm the general verdict of a jury permitted to consider a federally preempted theory of negligence so long as the jury might have based its verdict on an alternate theory.

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INTEREST OF *AMICUS CURIAE*[1]

The Association of American Railroads is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75% of the rail industry's line haul mileage, produce 93% of its freight revenues, and employ 91% of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry. AAR believes that its familiarity with the history and operation of rail crossings, as well as its appreciation of the consequences of the decision below, will aid this Court's understanding of the issues presented here. Accordingly, among other topics, this brief provides background information about the rail crossing system that underlies the verdict in this case.

Both of the questions presented are of substantial concern to AAR's members, for both implicate the safe and efficient operation of rail systems. Because plaintiffs whose claims arise from railroad crossing accidents often seek punitive damages against railroads, AAR has a strong interest in the enforcement of constitutional limitations on punitive awards. With regard to federal preemption, the import of this case is plain. In the Federal Railroad Safety Act, Congress granted the Department of Transportation authority to regulate rail safety. DOT regulations preempt state law covering the same subject matter, and this Court has recognized that DOT's comprehensive regulations governing the speed at which trains travel have broad preemptive effect. Yet, under the ruling below, a preemption defense may be defeated by state rules of appellate practice that uphold any general verdict so long as the evidence would support a verdict on another basis

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* AAR states that no counsel for any party drafted this brief in whole or in part, and no persons or entities other than AAR or its members made any monetary contribution to its preparation or submission.

(even though there is no reason to surmise that the jury actually found liability on that basis). AAR's members have a strong interest in appellate vindication of federal preemption defenses and preventing their frustration by state law.

INTRODUCTION

As the petition for certiorari demonstrates, the Arkansas Supreme Court in the decision below nullified the constitutional limitations on punitive damages awards established in *State Farm Mutual Insurance Co.* v. *Campbell*, 538 U.S. 408, 424-25 (2003), and the state court's rulings stand in direct conflict with decisions of the United States Court of Appeals for the Ninth and Eleventh Circuits. Pet. 13-27. Furthermore, in upholding a general verdict where one of the presumed bases of the verdict was preempted by federal law, the state supreme court contravened the longstanding rule of *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884). Pet. 28-30.

These conflicts of decisional authority, and the broad importance of the questions presented for the vindication of federal rights in jury trials, alone justify certiorari. But review is particularly critical in this case, because the decision below as to both questions could result in arbitrary tort verdicts interfering with the efficient allocation of railroad resources in contravention of federal policy. State tort law plays but a limited role in a predominantly federally regulated, interstate industry. State court juries should not be allowed to impose punishment in excess of any legitimate state interest in retribution for or deterrence of specific conduct, or to impose liability on the basis of state law duties that are preempted by federal law. This Court should grant the petition.

BACKGROUND

Jury verdicts are a mechanism of regulation: "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236,

247 (1959). Punitive damages serve an even "broader function" than compensatory damages; "they are aimed at deterrence and retribution." *State Farm*, 538 U.S. at 416.

The regulatory force of jury verdicts is of special concern, however, when they intrude upon areas exclusively regulated by federal law, and when they reflect only "'"a decisionmaker's caprice."'" *Id.* at 418. Both concerns are implicated here. The jury verdict in this case was based in part on a theory of liability that is preempted under the Federal Railroad Safety Act, 49 U.S.C. § 20106, but the railroad's preemption defense was improperly defeated by a state law of appellate practice. Moreover, unwarranted awards of massive punitive damages in contravention of *State Farm* not only violate defendants' due process rights against arbitrary deprivations of property, but also do violence to the federal regulatory scheme. Such awards distort railroad decisionmaking, and result in a "misallocation of scarce resources" that adversely affects railroad operations. See Selection and Installation of Grade Crossing Warning Systems, 60 Fed. Reg. 11,649, 11,651 (proposed Mar. 2, 1995).[2] To appreciate fully the importance of the issues raised by this case, it is necessary for this Court to consider the complex regulatory system that has evolved to promote safety at rail crossings.

1. There are a staggering number of railroad crossings in the United States. As of 2002, there were 152,453 public vehicle crossings. Fed. R.R. Admin., U.S. Dep't of Transp., *Railroad Safety Statistics: Final Report 2002* tbl.9-1 (2004), *available at* http://safetydata.fra.dot.gov/Objects/bull2002.pdf. Including private vehicle and pedestrian crossings, there were more than 252,000 crossings in total. In the Union Pacific ("UP") system alone, there are more than 29,000 public vehicle crossings, and over 48,000 total crossings. *Id.*

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[2] A "public grade crossing" is an intersection of a railway and a public road at the same level (as opposed to, for instance, an overpass). Fed. R.R. & Highway Admin., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Solving the Problem* 2 (1972).

Beginning in the nineteenth century, state tort law placed on the railroads the burden of maintaining safe crossings. See *Cont'l Improvement Co.* v. *Stead*, 95 U.S. 161, 165 (1877). However, with the advent of the motor vehicle and rapid increases in highway traffic, it was soon recognized that "[t]he railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935) (footnote omitted); *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains & Motor Vehicles*, 322 I.C.C. 1, 82 (1964) ("In the past it was the railroad's responsibility for protection of the public at grade crossings. . . . Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.").

Historically, the railroads lacked the resources to confront the mounting dangers posed by the increased vehicle traffic, and lacked the jurisdiction to regulate that traffic. Despite increased state, federal and railroad expenditures on crossing safety, U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* 183 (2d ed. 1986), accidents rose to unacceptably high levels in the middle part of this century even as railroad line mileage declined. *Id.* at 2, 5 (annual fatalities from 1930-1970 ranged from 1200 to 2000). The 1960s brought a sharp spike in crossing fatalities, Fed. Highway Admin., U.S. Dep't of Transp., *Rail-Highway Crossings Study* 1-5 (1989), raising pressure on Congress to increase federal intervention to promote grade crossing safety.

Troubled by the statistical trend and other safety issues, and the inadequacy of haphazard state regulation,[3] Congress enacted the Federal Railroad Safety Act of 1970 ("FRSA"),

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[3] H.R. Rep. No. 91-1194, at 11 (1970) (expressing doubt that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

Pub. L. No. 91-458, 84 Stat. 971.[4] Its purpose was "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. It directed the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 347 (2000). The statute included a broad preemption provision, in which Congress unequivocally declared that "[l]aws, regulations, and orders related to railroad safety ... shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, subject to a narrow savings clause, States may only "adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.*; *Shanklin*, 529 U.S. at 347-48.

Section 433 of FRSA specifically addressed rail-highway crossings. It required the Secretary to confront the grade crossing problem, and mandated that the Secretary prepare "a comprehensive study of the problem of eliminating and protecting grade crossings," including recommendations for appropriate action. 45 U.S.C. § 433 (repealed 1994).

In 1972, the Secretary of Transportation submitted the statutorily mandated study, and soon thereafter Congress enacted the Federal Railway-Highway Crossings Program. Pub. L. No. 93-87, tit. II, § 203, 87 Stat. 282, 283-84 (1973).[5] The

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[4] FRSA was originally codified at 45 U.S.C. §§ 421 to 447. As part of a broad reorganization of federal transportation laws, Congress formally repealed FRSA in 1994 and reenacted its substantive provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. This recodification was not intended to substantively change FRSA provisions, other than minor alterations in form or language. *See id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22.

[5] Congress repealed section 203 of the 1973 Highway Safety Act and reenacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130. Surface Transportation and Uni-

Program makes federal funds available to States "for the elimination of hazards of railway-highway crossings," 23 U.S.C. § 130(a), and is premised on the recognition that the resources do not exist to ensure maximal safety at all crossings, so States must develop systems to prioritize projects and put safety resources to their highest use. Thus, to secure section 130 funds, States must "conduct and systematically maintain a survey of all highways" to identify crossings in need of safety improvements, and "establish and implement a schedule of projects for this purpose." *Id.* § 130(d); U.S. GAO, GAO/RCED-95-191, *Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* 14 (Aug. 1995).[6]

This federal approach to crossing safety, predicated on a systematic and data-driven analysis of accident risks that directs safety resources to crossings of highest need, has been a resounding success. Although both highway and rail traffic have increased, the section 130 program has contributed to a precipitous decline in crossing accidents and fatalities: from 12,000 accidents and 1500 fatalities at railway crossings in 1972, to 3077 accidents and 357 fatalities in 2002.[7]

2. In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), this Court held that the "[l]egal duties imposed on railroads by the common law" are subject to preemption under FRSA if their subject matter is covered by DOT regula-

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form Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60.

[6] Because traffic control is not the responsibility of railroads, the Federal Highway Administration has determined that federal grade crossing improvements are of "no ascertainable net benefit to the railroads," 23 C.F.R. § 646.210(b)(1), (2), and thus railroads are not required to pay a share of the cost of such improvements.

[7] U.S. Dep't of Transp., *Accidents That Shouldn't Happen: A Report of the Grade Crossing Safety Task Force to Secretary Federico Pena* 2 (1996); *Railroad Safety Statistics*, *supra*, at tbl.1-1; *accord* Press Release, Fed. R.R. Admin., U.S. Dep't of Transp., Highway-Rail Crossing Fatalities Reach Record Low in 2003 (May 6, 2004), *available at* http://www.fra.dot.gov/us/press-releases/26.

tions. *Id.* at 664. The Court further held that the regulations implementing the section 130 program do not generally preempt a railroad's state tort law duties regarding warning devices at every crossing. *Id.* at 665-70. A specific federal regulation does govern the adequacy of devices installed with federal funds, however, and the Court ruled that this regulation, where applicable, preempts any state tort law duties of care in the selection of warning devices. *Id.* at 670-72.

Thus, after *Easterwood*, railroads remain subject to state tort law duties to ensure the safety of crossings not improved with federal funds, and even at federally improved crossings may retain certain duties (such as crossing maintenance) to the extent they are not covered by specific federal regulations. But even with this diminished role of state law, the Federal Railroad Administration still has lamented the risks to railroad safety created by large jury awards. Jury verdicts lead to "misallocation of scarce resources," causing limited funds to be spent on safety improvements "not where research and data indicates they will do the most good, but where a judge or jury determined, after the fact, that such a system should have been installed." Selection and Installation of Grade Crossing Warning Systems, 60 Fed. Reg. at 11,651. Such risks are dramatically enhanced when massive and arbitrary jury awards of punitive damages for crossing accidents go unchecked without regard for constitutional limits.

3. In 1971, the Secretary of Transportation invoked his authority to issue comprehensive regulations that govern maximum train speeds and which, pertinent here, apply to train crossings. Those regulations are now codified at 49 C.F.R. § 213.9. As the Court described them in *Easterwood*:

> Federal regulations ... codified at 49 C.F.R. § 213.9(a) (1992) set maximum allowable operating speeds for all freight and passenger trains for each class of track on which they travel. The different classes of track are in turn defined by, *inter alia*, their gage, alignment, curva-

> ture, surface uniformity, and the number of crossties per length of track. See §§ 213.51-213.143.

507 U.S. at 673. Because these regulations do not just establish maximum speeds, but do so on the basis of a variety of track conditions, they "should be understood as covering the subject matter of train speed with respect to track conditions, *including the conditions posed by grade crossings*." *Id.* at 675 (emphasis added). Accordingly, any claim based on excessive train speed is preempted under FRSA. *Id.*

In sum, state tort law has been entirely displaced in certain areas relating to railroad crossing safety. In other areas where tort law still imposes duties upon railroads, large and unwarranted damages verdicts pose a significant risk of misallocation of scarce resources. While the jurisprudential questions raised by UP's petition affect all state court defendants who are subject to large punitive damages awards, or have valid preemption defenses to state law damages claims tried to a jury, the malignant effects of the decision below on railroad operations and federal railroad policy in particular underscore the importance of this Court's review.

SUMMARY OF ARGUMENT

The verdict in this case—an astonishing $30.1 million, including $25 million of punitive damages—is premised on two interlocking errors that are worthy of review. First, the Arkansas Supreme Court's decision to uphold punitive damages flies in the face of this Court's decision in *State Farm*, and nullifies the bright-line rules and presumptions that this Court established as a check upon grossly excessive punishments imposed by juries. The state court's analysis of the due process guideposts established by this Court is deeply flawed and contrary to this Court's precedents, most notably its holding that any single-digit ratio of punitive to compensatory damages that is not "'breathtaking'" satisfies due process. Pet. App. 33a. The state court ignored this Court's holding that "[w]hen compensatory damages are substantial, then a lesser

ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *State Farm*, 538 U.S. at 425. This is only the latest example of state supreme court and federal appellate court rulings that, in absolute disregard of *State Farm*, uphold any ratio of compensatory to punitive damages less than 10:1, regardless of the absolute level of compensatory damages. The decision below, and those of likeminded courts, threatens to render *State Farm* a dead letter. This Court should grant review to bring the lower courts in line with its punitive damages precedents.

Second, the decision below conflicts with this Court's precedents regarding appellate review of general jury verdicts implicating federal rights. The verdict was premised on a theory of liability that is self-evidently preempted by federal law: The trial court permitted the jury to consider the Barbers' claim that UP was negligent in failing to enter a "slow order" to regulate the speed of trains at the crossing where the accident occurred—despite the fact that excessive speed claims are flatly preempted by federal regulation under FRSA. The Arkansas Supreme Court rejected UP's preemption challenge on appeal, improperly invoking a state rule of practice that allows a general verdict to stand even if tainted with legal error, so long as any other theory is legally supportable. This determination was contrary to binding precedents of this Court that establish the primacy of federal law, and it threatens the federal uniformity that FRSA was meant to ensure. This Court's review is imperative.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW ON PUNITIVE DAMAGES CONTRAVENES *STATE FARM*.

This Court has repeatedly expressed "concerns over the imprecise manner in which punitive damages systems are administered." *State Farm*, 538 U.S. at 417.

> "[P]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."

Id. In light of these concerns, this Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), established three guideposts for determining whether a punitive damages award is so grossly excessive that it violates due process: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the amount of punitive damages and comparable civil penalties. *Id.* at 575; *State Farm*, 538 U.S. at 418. In *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), this Court held that appellate courts must review the trial court's application of the *BMW* guideposts *de novo*, for "[e]xacting appellate review ensures that an award of punitive damages is based upon an '"application of law, rather than a decisionmaker's caprice."'" *State Farm*, 538 U.S. at 418 (quoting *Cooper*, 532 U.S. at 436).

Far from "exacting appellate review" of the due process guideposts, the decision below is instead symptomatic of the cavalier disregard shown by numerous lower courts for this Court's landmark decision in *State Farm*. The petition comprehensively demonstrates the multiple flaws in the Arkansas Supreme Court's constitutional reasoning and its inconsistency with the precedents of this Court and other courts of appeals. Pet. 13-27. *Amicus* agrees with the petition's analysis, and will not repeat it here. There are two fundamental points of error in the decision below that bear emphasis, however, for they underscore the necessity of this Court's review.

1. The Arkansas Supreme Court wholly misconceived the analysis required by the reprehensibility guidepost, and its

opinion is fraught with analytical confusion. On the one hand, it acknowledges the requirement of *de novo* review of the *BMW* guideposts, Pet. App. 31a, but a few pages later holds in contradiction that "[w]e will not substitute our judgment for that of the jury when there is basis in the evidence for the punitive award," and will overturn an award only if it "shocks the conscience," *id.* at 36a, effectively assimilating *BMW* review to traditional excessiveness review under Arkansas law, see *id.* at 41a (Thornton, J., dissenting).

State Farm makes clear that the jury's factual determinations and the reviewing court's *de novo* constitutional inquiry are independent. The jury here found that UP acted with malice or in reckless disregard of the consequences. Pet. App. 6a. That finding is highly dubious, as the dissent recognizes. The state highway department never required or suggested additional safety devices at the crossing; there was no evidence of prior accidents; and "Union Pacific entered into a contract with Tweedy Contractors to clear the vegetation four months prior to the accident, specifically taking affirmative steps to remedy any vegetation problem at Crossing 123, thereby demonstrating a lack of malice." *Id.* at 41a-42a (Thornton, J., dissenting). Moreover, although two witnesses testified to near-misses when approaching the crossing from the same side as the plaintiff did here, it is undisputed that UP received no notice of those near-misses, *id.* at 15a-18a, and thus could not have acted in conscious disregard of a known risk that vehicles were entering the crossing unaware of an approaching train because of excess vegetation.

But even when (as here) the reviewing court is inclined to uphold a jury finding of recklessness, that does not end the constitutional inquiry. Under the reprehensibility guidepost, the court still must determine "'the reasonableness of [the] award'" based on "'*the degree* of reprehensibility of the defendant's conduct.'" *State Farm*, 538 U.S. at 419. "[P]unitive damages should only be awarded if the defendant's culpability, *after having paid compensatory damages*,

is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* (emphasis added). Thus, *State Farm* requires the Arkansas Supreme Court to determine, *de novo*, that the reprehensibility was of such a degree that the state's legitimate interests in deterrence and retribution would reasonably demand an additional fine of $25 million, beyond the inherent deterrent effect of $5.1 million in compensatory damages. Here, UP's conduct was low on the scale of reprehensibility by any measure; its putative recklessness consisted of a failure to expedite the performance of an existing vegetation removal contract despite knowledge of complaints that the vegetation at the crossing was excessive. Pet. App. 2a, 41a-42a. The state court simply never undertook the proper *de novo* inquiry as to whether such conduct warrants a $25 million punishment in addition to the substantial payment of millions of dollars in compensatory damages.[8]

2. The Arkansas Supreme Court's ruling also directly contravenes *State Farm* in regard to the second constitutional guidepost of the disparity between punishment and harm. In *State Farm*, this Court admonished that although the Due Process Clause does not mandate precise mathematical formulas, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. The Court noted its prior declarations that a ratio of 4:1 "might be close to the line of constitutional impropriety," but recognized that "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id.* Importantly, this Court noted that "[t]he converse is also true, however. When compensatory damages are substantial,

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[8] The court below is not the only one to circumvent *State Farm* in this fashion. *See In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1097 (D. Alaska 2004) (upholding $4.5 billion punitive damages award in part on the theory that the defendant "willfully allowed" the harm-causing conduct).

then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* Because the compensatory damages in *State Farm* of $1 million were "substantial," the underlying conduct, although intentional (namely, fraud and intentional infliction of emotional distress, *id.* at 414-15), at most "would justify a punitive damages award at or near the amount of compensatory damages," *id.* at 426, 429.

State Farm dictates the result here. The Barbers were awarded $5.1 million in compensatory damages. Given that the $1 million award in *State Farm* was "substantial," the much larger award in this case is *a fortiori* substantial. Thus, even if the conduct alleged here were, as in *State Farm*, intentional, at the very most it would only "justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429. Indeed, the logic of *State Farm* is that (for a given level of conduct) the greater the burden of compensatory damages, the lower the constitutionally permissible ratio should be. Absolute dollars matter as well as ratios in determining whether a punitive award fulfills legitimate state interests in punishment and deterrence, and there may be cases where even a 1:1 ratio is grossly excessive.

But instead of vacating the punitive damages award or, at most, limiting such damages to a figure "at or near the amount of compensatory damages," the court below upheld punitive damages *five times greater* than the compensatory damages award: $25 million. It treated *State Farm* as effectively creating a safe constitutional harbor for single-digit ratios, and devised an unwarranted and amorphous rule that a single digit ratio will satisfy the disparity guidepost unless the result is "'breathtaking.'" Pet. App. 33a. The state court simply disregarded the presumption set forth in *State Farm* that ratios in excess of 1:1 will typically exceed due process limits where compensation is substantial.

The award of punitive damages in this case is manifestly unconstitutional, and it is emblematic of the manner in which

lower courts have failed to heed *State Farm*. In just the past few months, the Ninth Circuit and the Utah Supreme Court have brazenly disregarded *State Farm*, and affirmed punitive damages awards that are multiples larger than underlying, multimillion-dollar compensatory verdicts. In *State Farm II*, the Utah Supreme Court ignored on remand this Court's statement that the punitive damages "'likely'" should be "'at or near the amount of compensatory damages'"—approximately $1 million—and instead awarded over $9 million in punitive damages. *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, __ P.3d __, 2004 WL 869188, at *1-*3, *9-*10 (Utah Apr. 23, 2004), *petition for cert. filed*, No. 04-116 (U.S. July 20, 2004). The Ninth Circuit likewise ignored *State Farm*, instead embracing the remarkable proposition that "State Farm's 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter* v. *Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014 (9th Cir. 2004).

In similar fashion, the Eighth Circuit upheld a punitive damage award of $10 million on the counterintuitive theory that that award was in fact "at or near" the compensatory damage award of $2.4 million. *Eden Elec., Ltd.* v. *Amana Co.*, 370 F.3d 824, 828-29 (8th Cir. 2004) (citing *State Farm*, 538 U.S. at 419-20). Likewise, the Federal Circuit has upheld punitive damages of $50 million on top of compensatory damages of $15 million. *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), *cert. denied*, 124 S. Ct. 1423 (2004). And the Arkansas Supreme Court has itself previously upheld punitive damages of $21 million above a compensatory award of $5 million. *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346, 361, 363 (Ark.), *cert. denied*, 124 S. Ct. 532 & 535 (2003). Other courts have similarly ignored *State Farm*.[9]

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[9] *E.g.*, *In re Exxon Valdez*, 296 F. Supp. at 1101, 1110 ($4.5 billion punitive; approximately $513 million "total actual harm"); *Interclaim Holdings Ltd.* v. *Ness, Motley, Loadholt, Richardson & Poole*, 298 F. Supp. 2d

This disregard of *State Farm* is all the more important in the specific context of rail crossings. Transportation markets are competitive and railroad operating margins are quite thin. See *R.R. Revenue Adequacy—2003 Determination*, STB Ex Parte No. 552 (Sub.-No. 8) (STB Aug. 12, 2004) (finding that no major U.S. rail system earned the industry cost of capital during 2003). The payment of massive, multimillion-dollar punitive damages awards that exceed any reasonable deterrent purpose simply takes money from other vital needs, such as capital upgrades or other infrastructure improvements. If the failure to act immediately upon public complaints regarding certain crossing conditions can be transmogrified into recklessness on the thin evidence presented here, then as a protective measure railroads will be forced to expend scarce resources to act upon any such complaints, even where spending is unwarranted. This is exactly the arbitrary overdeterrence by juries exercising the power of punishment under state law that *State Farm* was supposed to end. 538 U.S. at 417 ("To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.").

Furthermore, because of the sheer, violent force of collisions between moving trains and vehicles, injuries from crossing accidents are often devastating and frequently fatal. Accordingly, compensatory awards in the millions of dollars are not uncommon. If any ratio less than 10:1 that is not "'breathtaking'" as a matter of judicial hindsight presumptively passes constitutional muster, Pet. App. 33a, then the Due Process Clause provides scant protection for railroads from capricious punitive damages verdicts in the tens of millions of dollars. This Court should grant review to vindicate the constitutional limitations set forth in *State Farm* and restore rationality in the enforcement of state tort law against railroads.

746, 748, 765 (N.D. Ill. 2004) ($27.7 million; $8.3 million); Pet. 15 n.8 (cataloguing verdicts).

II. THE INVOCATION OF STATE RULES OF PRACTICE TO DEFEAT FEDERAL RIGHTS CONFLICTS WITH THIS COURT'S PRECEDENTS.

Certiorari should be granted for a second reason. At trial, the Barbers proceeded on multiple theories of negligence, including two theories related to the speed of the train—namely, that the train was operated at an excessive rate of speed, and that UP should have ordered the train to proceed more slowly. The trial court reached the extraordinary conclusion that only the former theory, and not the latter, was preempted under FRSA. Abs. 41; Pet. App. 5a. Plaintiffs' theory of negligent failure to issue a slow order was plainly preempted by federal speed regulations that cover the subject matter of train speed, *supra* at 7-8, and the trial court's conclusion to the contrary was both erroneous, and in conflict with the decisions of numerous courts.[10]

The Arkansas Supreme Court, however, declined to reach this issue. It concluded, instead, that because the jury had issued a general verdict, and because the jury had been pre-

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[10] A slow order plainly regulates train speed—it is an internal rule, set by a railroad, by which its trains are ordered to proceed more slowly because of track conditions. As such, the supposed failure to issue a slow order is preempted by *Easterwood*, which held that the federal speed regulations "cover[] the subject matter of train speed with respect to track conditions." 507 U.S. at 675. Both the Eighth Circuit and the Oklahoma Supreme Court have recognized as much, in direct conflict with the trial court's ruling below. *St. Louis S.W. Ry.* v. *Pierce*, 68 F.3d 276, 278 (8th Cir. 1995); *Hightower* v. *Kansas City S. Ry.*, 70 P.3d 835, 848-49 (Okla. 2003); *Myers v. Missouri Pac. R.R.*, 52 P.3d 1014, 1023 (Okla. 2002). Nor would any slow order claim fall within the possible exception recognized in *Easterwood* for claims based on a "duty to slow or stop a train to avoid a specific, individual hazard." 507 U.S. at 675 n.15. Courts correctly have recognized that "a specific, individual hazard" "'refers to a unique occurrence which could lead to a specific and imminent collision *and not to allegedly dangerous conditions at a particular crossing.*'" *Hightower*, 70 P.3d at 847-48; *Macfarlane* v. *Canadian Pac. Ry.*, 278 F.3d 54, 59 (2d Cir. 2002); *Herndon* v. *Nat'l R.R. Passenger Corp.*, 814 A.2d 934, 937-38 (D.C. 2003).

sented with multiple theories of negligence, the verdict must be upheld even if one of the underlying theories was flawed: "We cannot determine, and we will not speculate, upon which theory the general verdict of negligence was premised.... Hence, we must affirm." Pet. App. 20a.

That ruling conflicts squarely with this Court's governing precedent, which holds that where there is a general verdict and error was committed on any one issue of federal law underlying that verdict, then an inability to determine the jury's precise theory of liability means that "the verdict cannot be upheld." *Baldwin*, 112 U.S. at 493; *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962) ("Since we hold erroneous one theory of liability upon which the general verdict may have rested ... it is unnecessary for us to explore the legality of the other theories."); *United N.Y. & N.J. Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 619 (1959); *Wilmington Star Mining Co.* v. *Fulton*, 205 U.S. 60, 78-79 (1907).

It is of no consequence that the Arkansas Supreme Court purported to employ a state procedural rule, for it has long been recognized that a "'federal right cannot be defeated by the forms of local practice.'" *Felder* v. *Casey*, 487 U.S. 131, 138 (1988); *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) ("the assertion of federal rights ... is not to be defeated under the name of local practice"); see also Pet. 29-30. Not coincidentally, this principle developed in railroad litigation, where federal preemption is commonplace, and national uniformity is essential. See, *e.g.*, *Davis*, 263 U.S. at 24; *Brown* v. *W. Ry.*, 338 U.S. 294, 299 (1949) (FELA case; acknowledging the "desirable uniformity in adjudication of federally created rights").[11]

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[11] Similarly, in order to ensure uniformity in litigation under FELA, this Court has held "that questions concerning the measure of damages in an FELA action are federal in character," *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 (1980); that the "validity of releases under [FELA] raises a federal question to be determined by federal rather than state law," *Dice* v.

Moreover, this Court has specifically ruled on the manner in which state courts evaluate—or refuse to evaluate—federal issues on appeal and it has reaffirmed the general principle set forth above: "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail." *Love* v. *Griffith*, 266 U.S. 32, 33 (1924); *accord Liner* v. *Jafco, Inc.*, 375 U.S. 301, 304 (1964).

Review of this issue is particularly important because the decision below undermines the national policy established in FRSA. Congress granted the Secretary of Transportation broad powers to regulate railroad safety, 49 U.S.C. § 20103(a), and declared that state law on any subject matter covered by the federal regulation is preempted (absent special circumstances not present here), *id.* § 20106. Preempted state law includes state tort law duties, *Easterwood*, 507 U.S. at 664, and indeed it is in tort cases that FRSA preemption most commonly comes into play. Under the rule below, however, a plaintiff may try multiple theories of negligence to a jury, secure a general verdict based on a breach of a preempted state law duty, and yet evade appellate review so long as another theory survives the lenient state law standard for sufficiency of evidence (regardless of whether the jury in fact found liability under that theory). As a result, railroads cannot safely conform their conduct to federal speed regulations without risk of massive state law liability, as FRSA intends. The ruling below is thus not only in conflict with this Court's precedents, but also undermines the uniformity of federal law by thwarting appellate review of federally preempted state tort law.

Akron, Canton & Youngstown R.R., 342 U.S. 359, 361 (1952); that restrictive state pleading standards cannot govern FELA cases, *Brown*, 338 U.S. at 298-99; and that the sufficiency of the evidence in a negligence claim under FELA is a question of federal law, *Brady* v. *S. Ry.*, 320 U.S. 476, 479 (1943).

Certiorari is further warranted because this case provides an opportunity for this Court to provide needed clarity about the appropriate treatment of general verdicts. As noted above, the Court has clearly stated that, when a general verdict rests upon an erroneous theory and it cannot be determined whether the jury relied upon that theory in reaching its verdict, the verdict must be overturned. *Baldwin*, 112 U.S. at 493. However, there is a mature and acknowledged circuit split over whether (and under what circumstances) such an error may be deemed harmless. See *Davis* v. *Rennie*, 264 F.3d 86, 105 (1st Cir. 2001) (recognizing the circuit split).[12]

The First, Second, Third, and Seventh Circuits have employed harmless error analysis, in which they consider whether there is a substantial probability that the same verdict would have been reached absent the error. *Davis*, 264 F.3d at 105; *Bruneau ex rel. Schofield* v. *S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759-60 (2d Cir. 1998); *Hurley* v. *Atl. City Police Dep't*, 174 F.3d 95, 121-22 (3d Cir. 1999); *McGrath* v. *Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir. 1981). Among these courts, however, only the Seventh Circuit has adopted the approach of the court below—namely, to place the extraordinary burden on the party challenging the verdict to demonstrate that *each* underlying theory of liability was infected with error, see *id.* This is a "maverick" rule, which has been roundly criticized as "contraven[ing] Supreme Court authority," *Kern* v. *Levolor Lorentzen, Inc.*, 899 F.2d 772, 790-91 (9th Cir. 1990) (Kozinski, J., dissenting), and it is precisely the same rule employed below. Pet. App. 19a-21a.

By contrast, the Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have followed *Baldwin* and its progeny

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[12] Other authorities to recognize this decisional conflict include *Kerkhof* v. *MCI Worldcom, Inc.*, 282 F.3d 44, 52 (1st Cir. 2002); *Kern* v. *Levolor Lorentzen, Inc.*, 899 F.2d 772, 790-92 (9th Cir. 1990) (Kozinski, J., dissenting); and Ryan Patrick Phair, *Appellate Review of Multi-Claim General Verdicts: The Life and Premature Death of the* Baldwin *Principle*, 4 J. App. Prac. & Process 89 (2002).

strictly, and have held that an error underlying a general verdict requires outright reversal. *Anixter* v. *Home-Stake Prod. Co.*, 77 F.3d 1215, 1229 (10th Cir. 1996) ("where a jury has returned a general verdict and one theory of liability upon which the verdict may have rested was erroneous, the verdict cannot stand"); see *Ely* v. *Blevins*, 706 F.2d 479, 480 (4th Cir. 1983) (per curiam); *Nowell ex rel. Nowell* v. *Univ. Elec. Co.*, 792 F.2d 1310, 1312 (5th Cir. 1986); *Elder-Beerman Stores Corp.* v. *Federated Dep't Stores, Inc.*, 459 F.2d 138, 147-48 (6th Cir. 1972); *Bone* v. *Refco, Inc.*, 774 F.2d 235, 242-43 (8th Cir. 1985); *Torcise* v. *Cmty. Bank of Homestead (In re Torcise)*, 116 F.3d 860, 869 (11th Cir. 1997).[13] For these reasons, this case provides an opportunity to bring needed clarity to an issue infected with confusion in the circuit courts.

* * * *

In recent years, this Court repeatedly has recognized the constitutional and practical dangers that flow from arbitrary and unchecked punitive damages awards. That danger is particularly acute where railroads are concerned, because safety on the Nation's railroads and at public grade crossings is a matter of extensive federal regulation. To allow, as here, tens of millions of dollars in punitive damages to be added to a multimillion-dollar compensatory award, and to permit state appellate procedures to insulate such an award from review, is to permit capricious damages awards to undercut the regulatory framework established by Congress.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for certiorari, this Court should grant the petition.

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[13] The Ninth Circuit has taken yet a third approach, pursuant to which it will "'attribut[e]'" a general verdict to one of the non-erroneous theories underlying it, if the case satisfies a four-factor test. *Counts* v. *Burlington N. R.R.*, 952 F.2d 1136, 1140 (9th Cir. 1991); *cf. Kern*, 899 F.2d at 790-92 (Kozinski, J., dissenting) (criticizing the Ninth Circuit test).

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No. 04-47

IN THE

Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,

Petitioner,

v.

CHRIS BARBER, CLAUDETTE BARBER, AND ALLIED WASTE INDUSTRIES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In this personal injury case arising from a grade crossing accident, the Arkansas Supreme Court affirmed a $25 million punitive damage award against Union Pacific on the theory that the company "prioritized monetary gain" over "personal safety," disregarding the fact that Union Pacific operated its train in conformance with the federal standards governing train speed.

Amicus will address the following questions:

1. Whether the Arkansas court misapplied the reprehensibility guidepost, and violated this Court's decision in *State Farm v. Campbell*, by disregarding Union Pacific's compliance with federal speed requirements and holding that Union Pacific acted with "a high degree of reprehensibility" based on a purported "corporate policy" of favoring profit over safety and its alleged litigation misconduct.

2. Whether the Arkansas court erred in upholding a 5:1 ratio of punitive to compensatory damages, despite this Court's holding in *State Farm* that "[w]hen compensatory damages are substantial," even a 1:1 ratio between punitive and compensatory damages "can reach the outermost limit of the due process guarantee."

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with over 130 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 650 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached in the Addendum.

Because plaintiffs routinely seek punitive damages in product liability cases, the fair administration of punitive civil sanctions is an issue of great importance to product manufacturers, and PLAC has filed *amicus* briefs in this Court's three most recent decisions involving constitutional excessiveness challenges to punitive damage awards: *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, PLAC states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than PLAC or its counsel made a monetary contribution to the preparation or submission of this brief.

424 (2001), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). As set forth below, PLAC believes that the constitutional limitations on such awards should be faithfully enforced, and manufacturers should not be punished for reasonable design decisions that were made in good faith and in conformance with federal safety standards and regulations.

STATEMENT

Respondent Chris Barber was injured when he was traveling in a garbage truck that was struck by a Union Pacific train at a grade crossing. Petitioner's Appendix ("Pet. App.") 1a-2a. A jury found Union Pacific negligent and awarded Mr. Barber and his wife $5.1 million in compensatory damages and $25 million in punitive damages. *Id.* at 1a.

The Arkansas Supreme Court affirmed, rejecting Union Pacific's challenge that the punitive damage award was unconstitutionally excessive under *State Farm v. Campbell*, 538 U.S. 408. *See* Pet. App. 29a-36a. Although a federal track inspector had testified that the track at the grade crossing was "Class 4" track safe for travel up to 60 miles per hour, and although it was undisputed that the Union Pacific train was traveling less than 60 miles per hour at the time of the collision, the court nonetheless held that Union Pacific's conduct "was indicative of a high degree of reprehensibility." *See* Pet. 4, Pet. App. 33a. The court stated that Union Pacific had a "corporate policy . . . that put company profits before public safety," asserting that "Union Pacific prioritized monetary gain over the personal safety of those crossing its train tracks." Pet. App. 30a, 32a. The court added that the punitive sanction was further warranted because Union Pacific allegedly engaged in litigation misconduct by "intentionally destroy[ing]" evidence. *Id.* at 32a.

The court held that a 5:1 ratio of punitive to compensatory damages was constitutionally permissible under *State Farm*. It asserted that "[t]he standard to be employed is whether the ratio is 'breathtaking,'" citing this Court's observation that "'[s]ingle-digit multipliers are more likely to com-

port with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, or of 145 to 1.'" Pet. App. 33a (quoting *State Farm*, 538 U.S. at 425 (ellipses omitted)). The court concluded that "[u]nder the circumstances of this case, a multiplier of 5 is justified." Pet. App. 33a.

SUMMARY OF ARGUMENT

The Arkansas Supreme Court misapplied and evaded the reprehensibility guidepost established in *State Farm* and *Gore* in ways that are becoming increasingly common in the lower courts, particularly in product liability cases involving personal injury. The court ignored Union Pacific's good-faith compliance with the federal speed regulation; it penalized Union Pacific for allegedly "put[ting] corporate profits before public safety"; and it focused heavily on Union Pacific's alleged litigation misconduct in justifying the $25 million sanction. This type of reasoning has persisted even after *State Farm* and deprives the reprehensibility guidepost of any constraining force in cases involving physical harm, opening the door to arbitrary and excessive punitive damage awards. This Court's guidance is needed to reinforce and clarify that a defendant's reasonable belief that its conduct is lawful—for example, as reflected in its compliance with federal safety standards—is highly relevant to the reprehensibility analysis, and that a corporation does not act maliciously simply because it sought to make a profit or because its product or service caused physical injury.

The decision below further contradicts *State Farm* by misapplying the ratio guidepost. The Arkansas Supreme Court is not alone in this regard: many courts, including courts that were specifically directed to reconsider cases in light of *State Farm*, have ignored this Court's holding that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. Faithful enforcement of the ratio guidepost is particularly important in product liability cases, where the

compensatory damage awards are often substantial, yet the defendant's level of reprehensibility is low. This Court should grant review to reinforce and clarify that the 1:1 ratio is a meaningful limitation on punitive damage awards that should not be ignored as a matter of course as the Arkansas Supreme Court did here, and as most courts have been doing since the day the Court announced its decision in *State Farm*.

ARGUMENT

This case vividly demonstrates how many lower courts are disregarding or evading this Court's ruling in *State Farm*. The trend is particularly apparent in negligence cases involving personal injury, such as the case at bar. Whereas this Court's prior decisions involving due process challenges to punitive damage awards have involved intentional torts causing economic injury such as fraud (*Gore*), unfair competition (*Cooper Industries*), and bad-faith failure to settle (*State Farm*), this case alleges negligence causing physical harm. *See* Pet. App. 1a. As Justice Kennedy recognized in *TXO Production Corp. v. Alliance Resources Corp.*, punitive damages that would be appropriate in the context of an intentional tort may not be appropriate in "a case of negligence [or] strict liability." 509 U.S. 443, 468 (1993) (Kennedy, J., concurring); *see also Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003) (applying *State Farm* and noting that negligence is "a degree of culpability ordinarily insufficient to support punitive damages at all").

Moreover, this case occurs against the backdrop of a heavily regulated industry. The Federal Railroad Administration—the federal agency mandated by law with ensuring rail safety—has specifically recognized that complex judgments as to what constitutes a "safe" grade crossing is best left to the judgment of federal regulators rather than the *ad hoc* determinations of state juries. The agency has explained that allowing juries to second-guess federal safety judgments through civil damage awards would lead to "misallocation of scarce resources" and would pressure railroads to install safety systems "not where research and data indicate they

will do the most good, but where a judge or jury determined, after the fact, that such a system should have been installed." *Selection and Installation of Grade Crossing Warning Systems*, 60 Fed. Reg. 11,649, 11,651 (Mar. 2, 1995).

This case thus presents the Court with an excellent opportunity to resolve important questions concerning the proper application of *State Farm* and *Gore* in the context of a negligence case involving personal injury. As evidenced by the significant number of massive punishments juries have returned in recent years in product liability cases—including cases where the product is subject to a thorough scheme of federal regulation—these issues are recurring with increasing frequency, and guidance from this Court is needed.

I. THE ARKANSAS COURT MISAPPLIED THE REPREHENSIBILITY GUIDEPOST

The lower court's application of the reprehensibility guidepost cannot be reconciled with *State Farm* or *Gore*. Although PLAC agrees with Union Pacific that the court's analysis was flawed in many respects, this brief addresses three aspects of the ruling that often arise in product liability cases and are of particular importance to PLAC's members.

A. Union Pacific's Compliance With The Federal Speed Regulations Is Highly Relevant To The Reprehensibility Analysis

Plaintiffs' complaint alleged that Union Pacific acted negligently by operating its train "at an excessive speed for the conditions." Pet. App. 2a. Specifically, plaintiffs contended that Union Pacific "failed to issue a 'slow order' calling for a speed restriction over that rail crossing." *Id.* at 4a. Although a federal track inspector testified that the track in question was "Class 4" track safe for travel up to 60 miles per hour (Pet. at 4; 49 C.F.R. § 213.9(a))—and although it was undisputed that the train was traveling slower than 60 miles per hour at the time of the collision (Pet. at 4)—the trial court permitted the jury to punish Union Pacific under Arkansas law for failing to operate its train at a slower speed.

PLAC agrees with Union Pacific that plaintiffs' state-law negligence claim is pre-empted under *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). But at a minimum, the fact that Union Pacific's conduct conformed to an on-point federal standard is highly relevant to the reprehensibility inquiry under *Gore* and *State Farm* because it is an objective indicator of the company's good faith and the reasonableness of its conduct. The Arkansas Supreme Court erred by disregarding it.

This Court has long recognized that a defendant's reasonable belief that its conduct was lawful strongly mitigates reprehensibility, and in some cases may foreclose punitive damages altogether. For example, in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 490 (1915), the Court held that a $6,300 civil penalty violated due process where the defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief" *even assuming* that the defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable." The Court has also recognized this principle in the context of qualified immunity, explaining that "if officers of reasonable competence could disagree on th[e matter at] issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Indeed, any other rule would raise serious vagueness problems with regard to quasi-criminal punishments such as punitive damages. *See United States v. Lanier*, 520 U.S. 259, 270-71 (1997) (qualified immunity test is "simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes"); *Colautti v. Franklin*, 439 U.S. 379, 401 (1979) (state abortion statute is unconstitutionally vague when the prohibited conduct depends on "a complex medical judgment about which experts can—and do—disagree"). *See also Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982) (strict vagueness scrutiny applies to statute that imposes quasi-criminal penalties).

Compliance with a statutory standard is compelling evidence that a defendant possessed a reasonable belief that its conduct was lawful. In *Gore*, the jury found that the defendant's policy with respect to the disclosure of factory repairs constituted "'gross, oppressive, or malicious' fraud" even though that policy was consistent with statutes defining disclosure obligations in about 25 States. 517 U.S. at 565. Alabama had no such disclosure statute, and this Court "accept[ed] . . . the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate." 517 U.S. at 579-80. Nevertheless, this Court recognized that BMW, in attempting to determine what it was required to disclose, "could reasonably rely on [other] state . . . statutes for guidance." *Id.* at 579. The Court also noted that the "diversity" of state laws "demonstrates that reasonable people may disagree about the value of a full disclosure requirement." *Id.* at 570. The Court concluded that a failure to disclose is "less reprehensible . . . when there is a good faith basis for believing that no duty to disclose exists," *id.* at 579-80, and when "a corporate executive could reasonably interpret" the law to allow nondisclosure. *Id.* at 578.

Where, as here, the standard is part of an extensive federal regulatory scheme, a defendant that relies on the standard is acting reasonably, and there is a serious question as to whether *any* punitive damages are constitutionally permissible. The facts of this case exemplify the sort of situation contemplated in *State Farm*, where the Court stated that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should *only* be awarded if the defendant's culpability, after having paid compensatory damages, is *so* reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." 538 U.S. at 419 (emphases added).

Many of PLAC's members design and sell products that are subject to an extensive federal regulatory scheme. For example, automobile manufacturers design their vehicles to comply with the Federal Motor Vehicle Safety Standards, promulgated pursuant to the Motor Vehicle Safety Act, 49

U.S.C. § 30101 *et seq*. Even if a manufacturer can be held liable under state negligence law for designing a vehicle that fully complies with federal safety standards, the manufacturer's reliance on, and compliance with, the federal standards should negate any finding that the manufacturer acted reprehensibly. At a bare minimum, courts should regard such compliance as evidence that strongly mitigates the manufacturer's level of reprehensibility.

This due process principle is consistent with the approach followed by the many courts that have treated a defendant's good-faith reliance on federal safety standards as sufficient to bar punitive damages altogether. For example, in *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994), the Eleventh Circuit reversed a punitive damage award against a tire manufacturer because "the record demonstrates that [the manufacturer] complied with all requisite Federal Motor Vehicle Safety Standards" governing the challenged design. Similarly, in *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995), another product liability case, the court held that punitive damages were barred where no government agency had ever required the design feature plaintiff claimed the defendant should have utilized. *See also Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986) (punitive damages impermissible where manufacturer complied with federal standards). As one of the leading torts treatises recognizes, "[i]n most contexts . . . compliance with a statutory standard should bar liability for punitive damages." W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* § 36, at 233 n.41 (5th ed. 1984).

Many state codes reflect this principle by providing that a manufacturer's compliance with safety standards creates a presumption that the product is not even defective. *See, e.g.*, Fla. Stat. § 768.1256(1) (when a manufacturer complies with relevant federal regulations, "there is a rebuttable presumption that the product is not defective or unreasonably dangerous and the manufacturer or seller is not liable"); Ky. Rev. Stat. § 411.310(2) ("In any product liability action, it shall be presumed, until rebutted by a preponderance of evidence to

the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards . . . .").

The Arkansas court's refusal to consider Union Pacific's reasonable, good-faith belief that its conduct was lawful, based (among other things) on its compliance with the federal speed standard, directly conflicts with *Gore* and *State Farm*. Even if *some* amount of punitive damages can be imposed because plaintiffs' witnesses disagree with Union Pacific and the federal government, the existence of grounds for reasonable people to disagree on this issue, and of strong objective indicators that Union Pacific's conduct was both lawful and reasonable, surely is relevant to the reprehensibility analysis, just as the state disclosure statutes were relevant to that issue in *Gore*.

Guidance from this Court is necessary because many lower courts, even in the wake of *State Farm*, persist in approving massive punitive damage awards based on the opinions of plaintiffs' litigation experts, even though reasonable people, reasonable experts, and the United States government can and do disagree with those opinions. For example, in *Buell-Wilson v. Ford Motor Co.*, No. GIC800836 (Cal. Super. Ct. Aug. 19, 2004), the court awarded $150 million ($75 million in punitive damages and $75 million in non-economic damages) on the basis of an alleged design defect in a vehicle, even though the vehicle fully complied with all federal safety standards and even though the verdict had been preceded by thirteen consecutive defense verdicts in other cases alleging the same defect. Similarly, in *Douglas v. DaimlerChrysler Corp.*, No. CV2001-019659 (Ariz. Super. Ct. July 2, 2004), the court upheld a $50 million punitive damage award against DaimlerChrysler on the basis of an allegedly "weak" seatback design that more than *tripled* federal strength requirements. Verdicts like these end up deterring conduct that is entirely lawful and even socially desirable, simply because it is not above criticism from paid litigation experts—or they end up deterring nothing, because they provide no rational way for product manufacturers to

distinguish in advance between conduct that will be punished and conduct that will not.

The problem is not confined to the automotive industry. In 1997, CSX Transportation ("CSXT") was assessed with $2.5 *billion* in punitive damages by a New Orleans jury in connection with a tank car fire that occurred after the car was left at CSXT's facility. CSXT's "reprehensible" conduct was its failure to discover that the tank car was leaking a combustible substance. In affirming a remitted $850 million award, the Louisiana Court of Appeal gave no weight to the undisputed evidence that CSXT's tank car inspection practices conformed with all federal and other legal requirements, were fully consistent with industry standards of good practice, had never resulted in a tank car accident at the facility except for the accident at issue, and that CSXT had been commended by the New Orleans City Council for its conduct in connection with the fire. *See In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 373, 375 (La. Ct. App. 2001), *petition for cert. dismissed per stipulation*, Louisiana Supreme Court No. 2001-C-2485.

When government agencies have reached the same conclusion as the defendant, the degree of reprehensibility under *State Farm* (if reprehensibility exists at all) is necessarily very low. This Court should grant plenary review to clarify this important and undeniably recurring issue.

B. The Arkansas Court's "Profits Over Safety" Rationale Is Misguided

The Arkansas Supreme Court also punished Union Pacific because it allegedly implemented a "corporate policy . . . that put company profits before public safety." Pet. App. 30a. This flawed rationale is common in product liability cases, where courts often hold that a manufacturer should be punished because in designing its product it did not take every possible precaution to maximize safety.

Courts that follow this approach ignore precisely what the Arkansas court ignored in this case: corporate decisions often implicate tradeoffs and require an assessment of rela-

tive costs and benefits. In the context of train operation, the railroad must weigh the dangers associated with a given speed against the many benefits that flow from faster trains, including the faster carriage of passengers and consumer goods—benefits that flow to the public and society as a whole. The fact that an accident occurred does not automatically mean the train was traveling "too fast." If all trains traveled at 5 miles per hour, there would be fewer accidents, but the overall loss to commerce and society as a whole would outweigh the safety benefits. *Cf. United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (applying cost-benefit analysis in context of negligence inquiry).

The same tradeoffs occur in product design decisions. In designing a product, a manufacturer must balance the risks of a given design against the benefits in cost and utility. As the *Restatement* recognizes, "[s]ociety does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky." Restatement (Third) of Torts: Products Liability § 2 cmt. a (1998). The fact that a manufacturer could have struck the balance at a different point, and sacrificed cost or utility in order to incorporate an additional safety feature, should not subject the manufacturer to a massive punitive sanction if an accident occurs. Many products by their very nature pose risks of serious injury and death that cannot be materially reduced without significant cost to society in the form of increased prices, less convenience or utility, or even less safety in other circumstances. *See* Jane Spencer and Cynthia Crossen, *Why Do Americans Feel That Danger Lurks Everywhere? Fixation on Risk, Fed By Labs, Law and Media, Haunts The World's Safest Nation*, Wall St. J., Apr. 24, 2003, at A1 (noting that thousands of injuries were caused in 2001 by pillows, books, crayons, nails and electric Christmas decorations, among other products); *Corrosion Proof Fittings v. E.P.A.*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991) ("over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*"). The decision as to which design

strikes the proper balance among competing interests is often complex and rests upon a "morass of conceptual, political and practical issues on which juries, courts, commentators and legislatures strongly disagree." David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products*, 49 U. Chi. L. Rev. 1, 37 (1982).

Juries are often ill-suited to make these sorts of hindsight determinations in the context of individual cases involving tragic personal injuries, on the basis of a highly technical record and arcane and often conflicting opinion testimony from engineers and scientists. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 586-90 (2000) (noting that jurors often demonstrate bias against companies that engage in risk-safety balancing); Reid Hastie *et al.*, *Looking Backward in Punitive Judgments: 20-20 Vision?*, *in* Cass R. Sunstein *et al.*, *Punitive Damages: How Juries Decide* 96, 108 (2002) (concluding that "hindsight bias is almost inevitable when jurors make punitive damages decisions"). Such cases pose great danger that juries will "use their verdicts to express biases against big businesses." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431-32 (1994).[2]

Just as it is no answer to say that a manufacturer should be punished because its product caused injury, it is no answer to say that punishment is warranted because the corporation sought to make a profit. Pet. App. 30a. *All* businesses seek to make a profit, and the fact that a jury found a defendant to have struck the risk/safety balance at the wrong point does not automatically prove the existence of a "corporate policy [to] put company profits before public safety." *Id.* *See also*

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[2] Nor are courts necessarily well-suited to make such determinations either. *See* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 Colum. L. Rev. 1531, 1534 (1973) ("courts are not suited to the task of establishing specific product safety standards in the course of applying general reasonableness tests to determine the adequacy of allegedly defective products"); James A. Henderson, Jr., *Design Defect Litigation Revisited*, 61 Cornell L. Rev. 541 (1976).

State Farm, 538 U.S. at 420 (rejecting as unconstitutional the punishment of a defendant for its "nationwide policies" rather than for the conduct directed toward the plaintiff). This Court should grant plenary review to clarify the proper application of the reprehensibility guidepost in the context of a case where the defendant's conduct was not intrinsically wrongful—as in the case of an intentional tort or a knowing violation of a statute—but at the very worst reflected a negligent misjudgment concerning the relative costs and benefits of the challenged course of conduct.

C. Union Pacific Was Improperly Punished For Its Alleged Litigation Misconduct

The Arkansas court erred, and further contradicted *State Farm*, by punishing Union Pacific for its purported litigation misconduct that had nothing to do with plaintiffs' injury. The court held the alleged misconduct directly relevant to the reprehensibility analysis and the amount of the punitive damage award. *See* Pet. App. 32a ("the record reflects that Union Pacific engaged in acts of affirmative misconduct after being notified of the accident and the lawsuit against it"); *id.* ("The evidence shows that Union Pacific intentionally destroyed track records and voice tapes.").

This rationale cannot be reconciled with *State Farm*, which holds that "[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance." 538 U.S. at 424. Rather, this Court explained, a defendant may be punished only "for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423. In addition, because discovery misconduct may be addressed through the sanctioning provisions of the Federal Rules of Civil Procedure, permitting it to be considered for purposes of punitive damages raises the danger of duplicative punishments. *See State Farm*, 538 U.S. at 423 (emphasizing due process dangers of "the possibility of multiple punitive damages awards for the same conduct").

Here too, the Arkansas court's approach reflects a growing trend. In *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003), a decision that relied on *State Farm*, the Seventh Circuit emphasized the defendant's "great stubbornness with which it has defended [the] case" as a major justification for a large amount of punitive damages. And in the Utah Supreme Court's decision on remand in *State Farm* itself, the court punished State Farm based in large part on the "lack of remorse" and "callousness" the court supposedly discerned in State Farm's pleadings. *See Campbell v. State Farm*, 2004 WL 869188, *8 (Utah Apr. 23, 2004). As PLAC has shown in its *amicus* brief in support of State Farm's pending petition for certiorari, such an approach cannot be reconciled with the First Amendment's protection of free speech and the right to petition government. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) (restrictions on the type of arguments attorneys may make in court "implicate[ ] central First Amendment concerns"); *NAACP v. Button*, 371 U.S. 415, 429 (1963) (First Amendment "protects vigorous advocacy"); PLAC Br. in *State Farm v. Campbell*, No. 04-116, at 5-14 (discussing authorities).

The Arkansas court's erroneous reliance on Union Pacific's alleged litigation misconduct provides another reason for this Court to grant review: to make clear that punitive damages may not be used to sanction a party's conduct in connection with court proceedings, or to deter a party from mounting a vigorous defense.

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT A 9:1 RATIO IS *NOT* PRESUMPTIVELY CONSTITUTIONAL

A. The Ratio Requirement Is A Crucial Constitutional Protection

This Court's decision in *State Farm* reflected and enshrined the important constitutional principle that a punitive sanction must bear a reasonable relationship to the actual harm to the plaintiff caused by the defendant. *See* 538 U.S. at 424-28. The Court recognized that in *Pacific Mutual Life*

Insurance Co. v. Haslip, 499 U.S. 1, 23-24 (1991), it had concluded "that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." 538 U.S. at 425. The Court emphasized that it had "cited that 4-to-1 ratio again in *Gore*," and "further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id.* (citing *Gore*, 517 U.S. at 581). Importantly, this Court held that in cases where "compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added).

The Arkansas Supreme Court's ruling in this case cannot be reconciled with *State Farm*. The $5.1 million compensatory damage award was undeniably "substantial." *Cf. State Farm*, 538 U.S. at 426 (holding that a $1 million compensatory damage award "was substantial"). Yet the Arkansas court affirmed a punitive damage award that is nearly *five* times the compensatory award, relying on this Court's statement that "'single-digit multipliers are more likely to comport with due process.'" Pet. App. 33a (quoting *State Farm*, 538 U.S. at 425). The Arkansas court utterly ignored this Court's directive that in cases where the compensatory award is substantial, a 1:1 ratio may be the constitutional maximum.

This Court should grant certiorari and confirm that *State Farm* means what it says: although a 9:1 ratio may be the presumptive outermost constitutional limit, it is *not* the norm, and for cases such as this one, a 1:1 ratio (or something very close to it) may not be exceeded.

Indeed, in many cases, even a 1:1 ratio can result in an excessive and unconstitutional sanction. For example, awards of compensatory damages often include a large component of non-economic damages, such as awards for pain and suffering or emotional distress. As this Court recognized in *State Farm*, these types of non-economic damage awards are very similar to punitive damage awards in that they "con-

tain [a] punitive element," and "'[i]n many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.'" 538 U.S. at 426 (quoting Restatement (Second) of Torts § 908, cmt. c, p. 466 (1977)). Moreover, non-economic damages are often plagued by the same problems as punitive damages, such as inadequate guidance to juries, lack of objective criteria against which to measure outcomes, and the general absence of principled bases for judicial review—all of which leads to radically varying and arbitrary awards.

Here, a large portion of the compensatory damage award was intended to compensate the plaintiffs for non-economic harm. In closing argument, plaintiffs' counsel asserted that plaintiffs suffered only $2.6 million in economic harm, Tr. 6578-79, yet the jury—having been instructed that it could award damages "for any pain and suffering or mental anguish experienced in the past and reasonably certain to be experienced in the future" (Tr. 6550)—awarded $5.1 million in total compensatory damages in a general verdict. This is further evidence that the $25 million punitive damage award is grossly excessive and unconstitutional.

Other courts have similarly misapplied this aspect of *State Farm* or ignored it altogether. For example, in the Utah Supreme Court's decision on remand in *State Farm* itself, the court held that the presence of non-economic damages actually requires a *larger* award because "conduct which causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm." *See* 2004 WL 869188, at *9.

The ratio requirement is particularly important in product liability cases, where juries frequently award large amounts of compensatory damages—often containing a substantial non-economic component—so that even a 1:1 ratio can result in a severe and unconstitutional sanction. *See, e.g.*,

Buell-Wilson v. Ford Motor Co. (upholding $75,000,000 in non-economic damages and a $75,000,000 punitive damage award even though the vehicle design complied with government safety standards and industry custom). Moreover, in many such cases the defendant's level of reprehensibility is low: the alleged defect is not readily apparent, and the claim involves a reasonable disagreement over a complex design judgment that the manufacturer made in good faith. A strong affirmation of the ratio principle will help ensure that this crucial constitutional protection is faithfully enforced.

B. Many Lower Courts Are Evading *State Farm*'s Ratio Requirement

This Court's guidance on the proper application of the ratio analysis is needed, as the decision below reflects a growing trend. Many lower courts have essentially disregarded *State Farm*'s holding that a 1:1 ratio is the presumptive limit in cases where compensatory damages are "substantial." As the Ninth Circuit recently declared, "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014-15 (9th Cir. 2004).

Like the court below, these courts have misinterpreted *State Farm*'s language that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," 538 U.S. at 425, as presumptively authorizing ratios of up to 9:1 in *any* case. For example, one court reasoned that "a red flag goes up" only if the award exceeds a 9:1 ratio, and suggested that any lower ratio "presumptively passes muster under the Due Process Clause." *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003).

Ironically, perhaps the most blatant disregard of this Court's ratio holding is the Utah court's decision on remand in *State Farm*, where the court imposed a punitive damage award that is nine times the compensatory award—in defiance of this Court's admonition that "application of the *Gore*

guideposts to the facts of [*State Farm*] . . . likely would justify a punitive damages award at or near the amount of compensatory damages." 538 U.S. at 429. The Utah court deemed this Court's ratio holding "plausible as an abstract proposition," but not binding on remand because it "does not account for the circumstances of the compensatory damages award in this case." 2004 WL 869188, at *9. *See* PLAC Br. in *State Farm v. Campbell*, No. 04-116, at 14-20.

This trend is especially apparent in several recent decisions involving products. For example, in *White v. Ford Motor Co.*, No. 95-0279 (D. Nev. Sept. 1, 2004), the court approved a remitted $42 million punitive damage award that is *thirty* times the amount of compensatory damages. The court dismissed "*State Farm*'s single-digit guideline" as "not necessarily binding," concluding that Ford should have been "on notice" that "punitive judgments in Nevada courts may approach a 30:1 ratio." Slip op. at 43.

In *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (Or. Ct. App. 2004), following a GVR in light of *State Farm*, the court upheld a 96:1 ratio and imposed a $79 million punitive damage award against Philip Morris. Even though the case was brought by the estate of a single plaintiff, the court upheld the award by theorizing that other individuals not before the court may have been harmed by the defendant's conduct—and that the punishment could be justified by reference to these hypothetical persons and imaginary harms. Thus, the court reasoned, because the defendant "inflicted potential harm on the members of the public in Oregon," a punitive award of $79 million was permissible, even though the plaintiff had been awarded only $820,000 in compensatory damages. *Id.* at 144. Acknowledging that the award vastly "exceed[s] a single-digit ratio," the court opined that "it is difficult to conceive of more reprehensible misconduct" and thus the "unique facts in this case . . . justify more than a single-digit award under the Due Process Clause." *Id.* at 145.

In *Douglas v. DaimlerChrysler Corp.*, the court affirmed a $50 million punitive damage award against DaimlerChrys-

ler—over 13 times the amount of the substantial $3.75 million compensatory damage award—for a purported design defect in a Dodge Ram truck. Relying on the interpretation offered in a law review article by a plaintiff's attorney rather than this Court's plain language, the Arizona court held that "contrary to reports, [*State Farm*] does not require that punitive damages be no more than nine times greater than compensatory." Slip op. at 5. Moreover, the court held that for purposes of the ratio analysis, the "denominator"—*i.e.*, the baseline amount of compensatory damages—should include the compensatory damages attributable to a nonparty defendant that was held 50 percent responsible for the harm. *Id.* at 1. In short, the court held that DaimlerChrysler could be punished for harm committed by another party—a result that violates *State Farm* and bedrock principles of due process.

In *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Or. Ct. App. 2003), the plaintiff was injured when her fishbowl shattered. She sued the manufacturer, and was awarded $100,000 in compensatory damages and $1 million in punitive damages. Following a GVR from this Court, the Oregon court declined to reduce the award to a 1:1 ratio, but rather held that "the maximum constitutionally permissible award in this case is four times the compensatory damages for which defendant is responsible." *Id.* at 576.

In *Bocci v. Key Pharmaceuticals, Inc.*, 76 P.3d 669 (Or. Ct. App. 2003), the court approved a 7:1 ratio in a product liability case following a GVR in light of *State Farm*. The court held that "[u]nder the circumstances of [the] case," it was "willing to approve a ratio in excess of the 4-to-1 ratio that apparently is something of a benchmark for the United States Supreme Court." *Id.* at 675.

Finally, in *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (Cal. Ct. App. 2003), another case GVR'd for reconsideration in light of *State Farm*, the California Court of Appeal held that a 5:1 ratio was appropriate in a defective design case, even though the compensatory damage awards of approximately $5 million were undeniably "substantial," and

even though a significant portion of the compensatory awards reflected non-economic harm. The court made clear that it did not consider itself "strictly constrained by the single-digit multiplier set forth in *State Farm*," 113 Cal. App. 4th at 763, let alone by this Court's holding that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

This Court should grant review to confirm that, when compensatory damages are substantial, a 9:1 ratio is *not* presumptively constitutional, and a 1:1 ratio is the maximum due process permits.

CONCLUSION

For the foregoing reasons, this Court should grant Union Pacific's petition and schedule this case for plenary review.

Respectfully submitted.

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No. 04-47

In the Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,

Petitioner,

v.

CHRIS BARBER, CLAUDETTE BARBER, AND ALLIED WASTE INDUSTRIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR THE UNITED STATES CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. Because the fair administration of punitive damages long has been a concern of the business community, the Chamber regularly files *amicus* briefs in punitive damages cases. It is the Chamber's experience that the lower courts routinely have been misapplying and, indeed, effectively nullifying the three excessiveness guideposts identified by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and clarified in *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2002). The Chamber is of the view that the lower courts need additional guidance from this Court as to the proper application of the *BMW* guideposts and that the present case is an ideal vehicle for providing that guidance.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court no doubt intended its decision in *State Farm* to send a strong message to lower courts about the need to enforce the procedural and substantive limitations on punitive damages. Unfortunately, although courts by and large have paid heed to this Court's observation that punitive awards rarely should exceed a single-digit multiple of compensatory damages, few have taken to heart the Court's further pronouncements that the historical tradition of double, treble, and quadruple damages remedies is "instructive" and that, when compensatory damages are "substantial," a 1:1 ratio may be the constitutional maximum.

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[1] All parties have consented to the filing of this brief and have sent letters to the Court to that effect. No counsel for any party to these proceedings authored this brief, in whole or in part. No other entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief.

The lower courts are systematically misapplying the first guidepost as well. In the absence of guidance from this Court, most reviewing courts have applied the standard of review used to test the sufficiency of evidence for a liability finding — taking the evidence in the light most favorable to the plaintiff, assuming the existence of any fact asserted by the plaintiff so long as the record contains "substantial evidence" to support it, and giving the plaintiff the benefit of all conceivable inferences supporting a finding of high responsibility. This near universal tendency to assume that the jury has found the defendant's conduct to be highly reprehensible and then to defer to factual "findings" that the jury may never have made is impossible to square with the law/fact distinction the Court drew in *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424 (2001), and with the procedural due process concerns it expressed in *State Farm*.

Finally, the lower courts have invoked a variety of means for depriving the third guidepost of any meaningful constraining force — notwithstanding this Court's rejection of such evasions in *State Farm*.

The present case exemplifies the ways in which courts are routinely misapplying each guidepost. Accordingly, it is an ideal vehicle for providing the additional guidance that the lower courts so badly need.[2]

ARGUMENT

In *State Farm*, this Court expressed "concerns over the imprecise manner in which punitive damages systems are administered," reiterated its admonition that "punitive damages pose an acute danger of arbitrary deprivation of property," and made clear that reviewing courts must undertake

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[2] The Chamber also has recently filed an amicus brief in No. 04-116 urging the Court to review the Utah Supreme Court's decision on remand in *Campbell v. State Farm Mutual Automobile Insurance Co.*, 2004 WL 869188 (Apr. 23, 2004). Both cases are excellent vehicles for providing the lower courts with the guidance they evidently continue to need.

"[e]xacting appellate review" in order to ensure that punitive awards are "based upon an application of law, rather than a decisionmaker's caprice." 538 U.S. at 417-418 (internal quotation marks and alterations omitted). Regrettably, whether out of defiance or confusion, lower courts have been routinely misapplying (and, in some instances, outright ignoring) the guidance provided in *State Farm*. Review is necessary to close up the loopholes that the Arkansas Supreme Court and other lower courts have been punching in *State Farm*.

A. The Lower Courts Are Systematically Misapplying The Ratio Guidepost.

In *State Farm*, this Court undertook to provide lower courts with more detailed guidance regarding the ratio guidepost than it had supplied in previous cases. Specifically, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"; reiterated that a punitive award of four times compensatory damages "might be close to the line of constitutional impropriety"; indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is "instructive"; and explained that, although a higher ratio may be permissible when "a particularly egregious act has resulted in only a small amount of economic damages," "[w]hen compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added). Applying these guidelines to the facts of the case before it, the Court observed that, even though the defendant's conduct was "reprehensible" and "merit[ed] no praise" (*id.* at 419-420), "a punitive award at or near the amount of compensatory damages" — *i.e.*, a 1:1 ratio — was likely the constitutional maximum. *Id.* at 429.

In the aftermath of *State Farm*, most lower courts have taken to heart the Court's admonition that double-digit (or higher) ratios will rarely be constitutional. At the same time,

however, many courts have assumed that single-digit ratios are immune from constitutional scrutiny, ignoring both this Court's statement that the 700-year legislative history of 1:1 to 3:1 ratios is "instructive" and its admonition that, when compensatory damages are substantial, a 1:1 ratio may be the constitutional maximum.

The present case, in which the Arkansas Supreme Court upheld a $25 million punitive award on top of a $5.1 million compensatory award, is illustrative. The court quoted this Court's statement that "'[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, * * *, or, * * * of 145 to 1.'" Pet. App. 33a (quoting *State Farm*, 538 U.S. at 425). But despite the large compensatory award, the court made no mention of *State Farm*'s clearly pertinent admonition that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial.[3]

This is not the only occasion on which the Arkansas Supreme Court has been unfaithful to the guidance this Court supplied in *State Farm*. In a prior case involving negligence on the part of a nursing home, that court approved a $21 million punitive award on top of compensatory damages of $5 million. *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 361, 363 (Ark.), cert. denied, 124 S. Ct. 535 (2003). There again, the

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[3] The $5.1 million compensatory award was "substantial" by any objective measure and indisputably constituted complete compensation for respondents' injuries. Although the award was not broken down into economic and non-economic components, respondents had alleged that their economic damages equaled "a little over $2,600,000." Tr. at 6579; see also Tr. at 6286-87, 6297-98, 6374. Accordingly, this Court may fairly assume that the jury awarded $2.6 million in compensatory damages for economic injuries and the balance for non-economic injuries. Cf. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 7 n.2 (1991) (assuming that the jury awarded the full amount of compensatory damages requested, for purposes of determining the portion of a general verdict that constituted punitive damages).

court focused exclusively on this Court's references to single-digit and 4:1 ratios with nary a nod to the Court's discussion of the 1:1 ratio.

Nor is the Arkansas Supreme Court alone in failing to pay full heed to the guidance this Court provided in *State Farm*. For example, in one of the first post-*State Farm* decisions, the Eleventh Circuit acknowledged that $500,000 emotional distress awards to each of seven white librarians who allegedly were victimized by reverse discrimination were "substantial," but nonetheless upheld punitive awards against three individual defendants that were between four and five times the compensatory damages allocated to those defendants. *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003), cert. dism'd, 124 S. Ct. 1168 (2004). Without making any inquiry into the extent to which the compensatory awards adequately satisfied the federal interests in deterrence and punishment, the Eleventh Circuit stated that the approximately 4:1 aggregate ratio was within "a range which the Supreme Court has found to be 'instructive,'" and therefore held that the ratio "does not indicate that the punitive damages award violates due process." *Ibid.*

In another case alleging employment discrimination, the Ninth Circuit upheld a $2.6 million punitive award that was over seven times the $360,000 compensatory award for economic loss and emotional distress. *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), cert. denied, 124 S. Ct. 1602 (2004). Focusing solely on the Court's observation that single-digit multiples are more likely to pass constitutional muster than higher ratios, the Ninth Circuit stated: "We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case." 339 F.3d at 1044.

Similarly, in a business tort case, the Federal Circuit held that *State Farm* did not require it to reduce a $50 million punitive award that was more than three times the compensa-

tory damages. *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), cert. denied, 124 S. Ct. 1423 (2004). The Federal Circuit's explanation well demonstrates why this Court's further guidance on ratios is so necessary. Focusing entirely on the Court's statements that few ratios exceeding single digits will pass constitutional muster and that a ratio of more than 4:1 may be close to the line — and ignoring entirely the Court's observation that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial (as they undeniably were in the case before it) — the Federal Circuit stated:

> In this case, the proportion of punitive damages to compensatory damages does not even approach the possible threshold of constitutional impropriety. The $50 million punitive award is barely above three times the compensatory award of $15 million in this case. That ratio remains within the "[s]ingle-digit multipliers [which] are more likely to comport with due process," not even reaching the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect.

345 F.3d at 1372 (alterations in original; citation omitted).

More recently, the Utah Supreme Court — in the *State Farm* remand itself — came up with a new way to evade this Court's guidance on the ratio guidepost. Rather than ignoring entirely this Court's suggestion that a ratio of 1:1 might be the constitutional maximum in that case, the Utah court instead opted to engage in revisionist history, claiming that what this Court really meant in *State Farm* is that "[t]he 1-to-1 ratio between compensatory and punitive damages is most applicable where a sizeable compensatory damages award for economic injury is coupled with conduct of unremarkable reprehensibility." *Campbell*, 2004 WL 869188, at *9. Because the Campbells' damages were emotional rather than economic, the court reasoned, a ratio in the upper single-digit

range, rather than the 1:1 ratio suggested by this Court, was justified. *Id.* at *9-*10.

The Ninth Circuit recently took a similarly defiant tack. Straining to uphold a $5 million punitive award that was 2.6 times the $1,920,849 compensatory award for past and future unpaid disability benefits and emotional distress, it flatly asserted that "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014 (9th Cir. 2004).

In short, whether by rewriting this Court's discussion of the ratio guidepost, engaging in a selective reading of it, or straightforwardly denying its significance, the lower courts have pretty much read out of the opinion the suggestion that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial. Indeed, of the 28 post-*State Farm* decisions released by state and federal appellate courts in which the compensatory award or potential harm has exceeded $200,000 (and thus could be said to be "substantial"), only once has a court construed *State Farm* to necessitate a reduction to a 1:1 ratio.

In that case, which involved racial harassment in the workplace, the Eighth Circuit held that a $6,063,750 punitive award that was just over ten times the compensatory award was unconstitutionally excessive and ordered a remittitur to the amount of compensatory damages, explaining:

> Mr. Williams's large compensatory award * * * militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process

> requires that the punitive damages award on Mr. Williams's harassment claim be remitted to $600,000.

Williams v. ConAgra Poultry Co., 378 F.3d 790, 799 (8th Cir. 2004) (citation omitted).

Aside from *Williams*, we are aware of no case in which an appellate court confronted with a compensatory award of $200,000 or higher has ordered a remittitur to 1:1 or below on federal excessiveness grounds. To the contrary, the overwhelming majority of courts — including other panels of the Eighth Circuit — have treated either 9:1 or 4:1 as a constitutional free pass. See, *e.g.*, *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (observing that "the compensatory damages award is substantial * * * and the punitive damages award is many times [the defendant's] net worth" and then going on to hold that, "[i]n these circumstances, the four-to-one ratio approved by the Supreme Court of Arkansas in *Sauer*, and by the U.S. Supreme Court in *Haslip*, becomes an appropriate due process maximum"); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 73 (Cal. Ct. App.) (stating that, "where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is 'close to the line'" and reducing ratio from 16.7:1 to 6:1 where compensatory damages were $1.5 million), review granted, 88 P.3d 497 (Cal. 2004); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736, 762 (Cal. Ct. App. 2003) (concluding that *State Farm*, *BMW*, and *Haslip* suggest that in run-of-the-mill case the outer limit of constitutionally permissible punitive damages is four times compensatory damages, and reducing ratio from 21.3:1 to 3.9:1 where compensatory damages were $258,570); *Williams v. Philip Morris Inc.*, 92 P.3d 126, 145 (Or. Ct. App. 2004) (concluding that, after "potential" harm to non-parties is considered, $79.5 million punitive award would "fall within *State Farm*'s 4-to-1 boundary"); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, 674-76 (Or. Ct. App.) (focusing exclusively on

Court's references to single-digit and 4:1 ratios, stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court," and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 215 n.3 (Pa. Super. Ct. 2003) (perfunctorily concluding that 2.7:1 ratio does not violate due process in light of *State Farm*'s statement on single-digit ratios, where compensatory damages were $300,000), appeal denied, 847 A.2d 1287 (Pa. 2004); *Harris v. Archer*, 134 S.W.3d 411, 438-39, 448 (Tex. Ct. App. 2004, pet. filed) (focusing exclusively on Court's references to single-digit and 4:1 ratios and reducing 7.4:1 ratio to 4:1, despite concluding that "lesser ratio" was warranted, where aggregate compensatory damages were $203,895); *Haggar Clothing Co. v. Hernandez*, 2003 WL 21982181, at *7 (Tex. Ct. App. Aug. 1, 2003, pet. filed) (focusing exclusively on Court's reference to single-digit ratios in upholding 6.7:1 ratio where compensatory damages were $210,000).[4]

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[4] See also, *e.g.*, *Conseco Fin. Servicing Corp. v. North Am. Mortgage Co.*, 2004 WL 1907796, at *11 (8th Cir. Aug. 27, 2004) (reducing $18 million punitive verdict to $7 million in unfair competition case in which compensatory damages were $3.5 million); *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004) (upholding $10 million punitive award on ground that "the ratio of slightly more than 4.5:1 does not offend due process" — even while acknowledging that "Eden's compensatory damage recovery was significant and that this is a commercial case"); *Greenberg v. Paul Revere Life Ins. Co.*, 2004 WL 74630, at *2 (9th Cir. Jan. 12, 2004) (upholding $2.4 million punitive award in insurance bad faith case in which compensatory damages were $547,445.42 on ground that 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities"), cert. denied, 124 S. Ct. 2918 (2004); *Simon v. San Paolo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367, 391 (Cal. Ct. App. 2003) (upholding punitive award that was 4.3 times non-compensable value of lost "benefit of the bargain" because, "[e]ven if *State Farm* had imposed a 'bright-line' ratio, 4 to 1 would be 'close to the line of constitutional impropriety,' but not presumptively unconstitutional"), review granted, 86 P.3d 881 (Cal. 2004); *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812

Because "[t]he precise [punitive] award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff" (*State Farm*, 538 U.S. at 425), it is not surprising that lower courts have reached different results in applying the ratio guidepost. But their near universal focus on the Court's references to single-digit and 4:1 ratios — and near universal disregard of its statement that a 1:1 ratio may be the constitutional maxi-

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(Cal. Ct. App. 2003) (deeming a 3:1 ratio to be constitutionally permissible in products-liability case in which surviving family members received almost $4.6 million in compensatory damages); *Maya B. v. Vogel*, 2004 WL 551325, at *13 (Cal. Ct. App. Mar. 22, 2004) (affirming ratio of 2:1 where compensatory damages were $790,000 in sexual assault case on ground that "single-digit multiplier was well within the discretion of the jury and trial court"); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos.*, 2003 WL 21224088, at *4 (Cal. Ct. App. May 28, 2003) (reducing 17.1:1 ratio to 3.4:1, where compensatory damages were $293,000, despite concluding that "[t]he facts here are not as bad as they were in *State Farm*"); *Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 916 (Mass. Ct. App.) (invoking Court's statement that single-digit multipliers are more likely to comply with due process in upholding aggregate ratio of 3.4:1 where aggregate compensatory damages were $424,000), review denied, 795 N.E.2d 573 (Mass. 2003); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 422 (Pa. Super. Ct. 2004) (acknowledging that 10:1 ratio exceeded *State Farm*'s single-digit presumptive ceiling for due process, but concluding that ratio passed constitutional muster in light of defendant's reprehensible conduct (insurance bad faith), its significant wealth, and the "limited" $278,825 compensatory award); *Austin v. Specialty Transp. Servs., Inc.*, 594 S.E.2d 867, 877 (S.C. Ct. App. 2004) (focusing exclusively on Court's references to single-digit and 4:1 ratios in concluding that aggregate ratio of 2.5:1 "comport[ed] with due process" where aggregate compensatory damages were over $1 million); *Trinity Evangelical Lutheran Church & Sch.–Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis.) (implicitly concluding that 7:1 ratio of punitive damages to $490,000 in potential harm was not suggestive of an excessive punishment), cert. denied, 124 S. Ct. 925 (2003); cf. *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064, 1075 (Utah 2003) (deeming federal excessiveness issue waived, but nonetheless upholding $5.5 million punitive award that was 5.5 times the compensatory damages as being "well within the single-digit ratio discussed by the Supreme Court in" *State Farm*), cert. denied, 124 S. Ct. 1716 (2004).

mum when compensatory damages are substantial — is much harder to comprehend. Further guidance is plainly needed.

B. The Lower Courts Are Systematically Misapplying The Reprehensibility Guidepost.

The present case also is an ideal vehicle for addressing a second critical issue that has confounded the lower courts — how the requirement of *de novo* review applies to the determination of the degree of reprehensibility of the defendant's conduct. This is a threshold question that arises in every case in which a reviewing court is tasked with evaluating an excessiveness challenge to a punitive award. And the answer to the question is very often determinative of the outcome of the excessiveness review. Accordingly, it is essential that the Court resolve the issue once and for all.

1. In *Cooper Industries*, the Court held that appellate courts must conduct a *de novo* review of trial courts' application of the three *BMW* excessiveness guideposts. 532 U.S. at 436. The Court reiterated that mandate in *State Farm*, observing that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." 538 U.S. at 418 (internal quotation marks omitted). In neither *Cooper Industries* nor *State Farm*, however, did the Court instruct lower courts as to the meaning of "exacting" review in the context of determining whether the punishment is commensurate with the degree of reprehensibility of the conduct.

In the absence of guidance from this Court, most courts have applied the standard used to test the sufficiency of evidence for a liability finding. That standard entails taking the evidence in the light most favorable to the plaintiff, assuming the existence of any fact asserted by the plaintiff so long as the record contains "substantial evidence" to support it, and giving the plaintiff the benefit of all conceivable inferences supporting a finding of high reprehensibility — rather than independently gauging the reprehensibility of the conduct.

The decision below is emblematic of this deferential approach. The Arkansas Supreme Court stated that, "'[w]hen punitive damages are alleged to be excessive, we review the proof and all reasonable inferences in the light most favorable to the appellees * * *.'" Pet. App. 29a (quoting *Advocat*, 111 S.W. 3d at 358). The court accordingly made no effort to determine for itself whether Union Pacific's conduct entailed the high degree of reprehensibility necessary to justify a $25 million punishment.[5] Indeed, as Justice Thornton noted in dissent, some of the "facts" upon which the Arkansas Supreme Court relied in its reprehensibility analysis had no basis at all in the underlying record. *Id.* at 41a-42a.

The Arkansas Supreme Court's refusal to engage in exacting scrutiny of the underlying facts and degree of reprehensibility of the punishable conduct is far from unique. See, *e.g.*, *Stogsdill*, 377 F.3d at 831 ("viewing the evidence in the light most favorable to the plaintiffs" as part of state and federal excessiveness review); *Hangarter*, 373 F.3d at 1014 (totality of court's reprehensibility analysis was statement that "[t]he evidence, *viewed in Hangarter's favor, can* support the conclusion that Defendants' conduct was [reprehensible]") (emphasis added); *Greenberg*, 2004 WL 74630, at *2 (totality of court's reprehensibility analysis was statement that "[t]he evidence of Paul Revere's repeated conduct * * * *was sufficient to allow the jury to find* such behavior reprehensible") (emphasis added); *Bogle*, 332 F.3d

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[5] The opinion is replete with instances in which the court pointed to the existence of evidence in the record supporting a possible "finding" rather than making an independent determination on the issue. See, *e.g.*, *id.* at 29a ("There is evidence that Union Pacific was on notice of the dangerous [condition of the crossing]."); *id.* at 30a ("Viewing the proof and all the evidence in the light most favorable to the Barbers, we conclude that Union Pacific knew, or should have known of the extreme danger presented to the public at [the crossing]."); *id.* ("There was also evidence to indicate a malicious intent perpetuated by Union Pacific."); *id.* 32a ("The record *also supports a finding* that Union Pacific manifested a reckless disregard for the health and safety of others.") (emphasis added).

at 1361 ("*A reasonable jury could have concluded from the evidence* that Appellants knew that transferring the Librarians on the basis of race was illegal, were warned not to make the transfers, and knew that other Fulton County officials had been caught and punished for making employment decisions on the basis of race * * *.") (emphasis added); *Romo*, 6 Cal. Rptr. 3d at 806 & n.8 (rejecting argument that *State Farm* requires a court "either to reevaluate the evidence or to accept only 'the core facts of the case that the jury had to find in order to return a punitive damage verdict against the defendant'" and concluding that "*[s]ubstantial evidence supports the jury's implicit conclusion* that Ford acted with malicious conduct under aggravated circumstances") (emphasis deleted and added); *Diamond Woodworks*, 135 Cal. Rptr. 2d at 761 ("[W]e are compelled to observe that a jury did, in fact, determine Argonaut's conduct to be fraudulent and reprehensible and deserving of significant punitive damages. Neither the Constitution nor the *Campbell* court's interpretation of the due process clause requires us wholly to ignore the determination of the jury * * *."); *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 574 (Or. Ct. App. 2003) ("[D]efendant fails to recognize that the jury decided the case in plaintiff's favor and that, as a result, *we must resolve all disputed facts in favor of plaintiff*.") (emphasis added).

2. The near universal tendency among lower courts to assume that the jury has found the defendant's conduct to be highly reprehensible and then to defer to factual "findings" the jury may not have made is impossible to square with this Court's precedents. In *BMW*, for example, an Alabama jury found that the defendant committed fraud and also found, by clear and convincing evidence, the prerequisite for imposition of punitive damages — that the fraud was "'gross, oppressive or malicious.'" *BMW*, 517 U.S. at 565 (quoting ALA. CODE § 6-11-20). Notwithstanding that jury finding, the Court independently evaluated the degree of reprehensi-

bility of the defendant's conduct, concluding that "none of the aggravating factors associated with particularly reprehensible conduct [was] present." *Id.* at 576. The Court emphasized that the jury's finding of the conduct necessary for punitive liability was entirely irrelevant to the excessiveness analysis, stating:

> We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. * * * That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages[, however,] does not establish the high degree of culpability that warrants a substantial punitive damages award.

Id. at 579-580.

In *Cooper Industries*, the Court expressly held that appellate review of a trial court's application of the *BMW* guideposts is *de novo*. In the course of so holding, it indicated that reviewing courts must accept "*specific* findings of fact" by the jury (532 U.S. at 439 n.12 (emphasis added)), thereby implying that, in the absence of such findings, reviewing courts must decide for themselves whether the aggravating factors characteristic of highly reprehensible conduct are present. And in *State Farm*, the Court reiterated the importance of "[e]xacting appellate review" (538 U.S. at 418), giving no indication that this critical constitutional requirement can be satisfied by application of a sufficiency-of-the-evidence type standard.

3. To the contrary, absent specific factual findings that can be reviewed deferentially, a sufficiency-of-the-evidence standard is inconsistent both with the law/fact distinction the Court drew in *Cooper Industries* and with the procedural due process concerns it expressed in *State Farm*. That is because neither a jury's finding of the conduct necessary for punitive liability nor the amount of punitive damages the jury elects to

impose supplies any indication of its assessment of the *degree* of reprehensibility of the defendant's conduct. Indeed, the jury's function in setting the amount of punitive damages does not typically involve determining whether any particular fact has been proven. Upon reaching the punishment-setting stage, the jury generally is not instructed that it must find particular facts and rarely is asked to return a special verdict answering specific factual questions bearing on the degree of reprehensibility of the defendant's conduct. Instead, juries typically are told little more than that they have discretion in setting the amount of punitive damages and that the purposes of punitive damages are to deter and punish. In short, the jury essentially is asked to make an impressionistic judgment about the amount of punishment to exact. The resulting verdict is the legal equivalent of an ink blot, subject to any number of possible interpretations.

It follows that the standard for reviewing the amount of punitive damages should be substantially different from the standard that applies to sufficiency challenges to liability determinations. Because it is not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found, application of a sufficiency-of-the-evidence standard would result in deference being given to what are in reality phantom factual determinations, which in turn results in "false positive" determinations of high reprehensibility.

As the present case demonstrates, this concern is more than hypothetical. During the punitive stage of the trial, Union Pacific's net worth of $9.6 billion "was written on a board and displayed to the jury." Pet. App. 6a. It is simply impossible to tell from the fact that the jury returned a multi-million dollar punitive verdict whether the jury accepted every inference urged on it by respondents or instead believed that, in view of the substantiality of the defendant's financial resources, a $25 million dollar award constituted modest punishment for conduct of modest reprehensibility.

4. The difference between deferring to a jury's finding of punitive liability and conducting a true *de novo* review of the degree of reprehensibility of the defendant's conduct is readily apparent in this case. Any court undertaking such a review would have to conclude that Union Pacific's conduct did not come close to the level of reprehensibility necessary to support a $25 million punitive award (12½ times the amount this Court deemed in *BMW* to be "tantamount to a severe criminal penalty" (517 U.S. at 585)).

Important to the Arkansas Supreme Court's conclusion that "Union Pacific's conduct was indicative of a high degree of reprehensibility" was its belief that the evidence supported a finding that Union Pacific "manifested a reckless disregard for the health and safety of others" by "ignor[ing] the dangerous condition of a crossing in the face of constant complaints and near misses." Pet. App. 32a-33a. But as the majority conceded, there had not been any prior accidents at the crossing. *Id.* Plus, as Justice Thornton noted in dissent, Union Pacific had entered into a contract with another party "to clear the vegetation four months prior to the accident, specifically taking affirmative steps to remedy any vegetation problem at [the crossing], thereby demonstrating a lack of malice." *Id.* at 41a-42a. Union Pacific may well have been negligent in failing to ensure that its contractor was attending to the vegetation as diligently as necessary, but that failure of oversight is hardly indicative of high reprehensibility.[6]

In short, as this case well demonstrates, the difference between sufficiency-of-the-evidence review and exacting re-

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[6] The majority noted that "there was evidence that Union Pacific prioritized monetary gain over the personal safety of those crossing its train tracks." Pet. App. 32a. But there was no evidence that any such "prioritiz[ation]" was the cause of the accident, so even if that evidence is taken as true, the majority's reliance upon it clearly runs afoul of this Court's holding in *State Farm* that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory * * * business" (538 U.S. at 423).

view can be the difference between upholding an eight-digit punishment and concluding that "a more modest punishment * * * could have satisfied the State's legitimate objectives" (*State Farm*, 538 U.S. at 419-420). Because the Arkansas Supreme Court regrettably is not alone in diluting the constitutionally mandated exacting review by engaging in unwarranted deference to phantom factual findings, this Court should grant certiorari to clarify that, in the absence of specific jury findings, reviewing courts must determine for themselves whether the evidence establishes the existence of aggravating factors indicative of high reprehensibility.

C. The Lower Courts Are Continuing To Either Misapply Or Give Short Shrift To The Civil Fines Guidepost.

In *State Farm*, this Court admonished lower courts to compare the punitive damages with the legislatively established fine (if any) that is *realistic* under the circumstances, not to dwell on "the remote possibility of a criminal sanction" or to "speculate[]" about penalties, such as suspension of a business license, that are unrealistic under the facts of the case. 538 U.S. at 428. In so doing, the Court no doubt intended to lay to rest the kind of result-oriented application of the third guidepost that the Utah Supreme Court had perpetrated in that case. Unfortunately, that objective has not been accomplished. Courts bent on upholding multi-million dollar punitive awards continue to ignore or misapply this guidepost as if *State Farm* had never been decided.

In many situations, it may be appropriate to compare the punitive award to the maximum penalty that theoretically could be imposed. See, *e.g.*, *BMW*, 517 U.S. at 584 (comparing punitive award to $2,000 maximum civil penalty under Alabama Deceptive Trade Practices Act). But when that theoretical maximum bears no relationship to actual fining practice, invocation of theoretical maximums serves only to sanction punishments that violate *BMW*'s "fair notice" underpinnings. As the Eleventh Circuit has explained:

> If a statute provides for a range of penalties depending on the severity of the violation * * *, it cannot be presumed that the defendant had notice that the state's interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute. On the contrary, the extent of the defendant's statutory notice is related to the degree of reprehensibility of his conduct. * * * [C]onstitutionally adequate notice of potential punitive damage liability in a particular case depends on whether [the] defendant had reason to believe that his specific conduct could result in a particular damage award.

Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1337 (11th Cir. 1999) (emphasis in original); see also *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1149 (9th Cir. 2002) ("even assuming that as a general matter 'severe' awards might be appropriate in some cases, Leatherman has not shown that the award here was comparable to the amount that might have been recovered in civil penalties in a comparable case").

The decision below conflicts squarely with *Johansen* and *Leatherman*. Completely ignoring actual fining practice, the Arkansas Supreme Court held that the $25 million punitive award passed muster under the third guidepost because it was "comparable" to "the total civil penalties authorized by law," which it determined to be $10,082,500 by adding together the maximum daily state and federal fines for overgrown vegetation ($500 and $20,000 per day, respectively) and treating each day as a separate violation. That measure of the comparable fine, however, is wildly unrealistic. The *total* amount of fines collected by the Federal Railroad Administration from *all* railroads in America for *all* safety violations (excluding hazardous materials) for the year following the accident was only $4.3 million. See Federal Railroad Administration, Office of Chief Counsel, *Railroad Safety*

Civil Penalty Cases Closed During Fiscal Year 1999 (Jan. 31, 2000). The penalty that would realistically be imposed for overgrown vegetation at a single crossing was certainly much less, and far from the $25 million that the jury awarded. Union Pacific therefore lacked adequate warning of the severity of punishment that was imposed.

The Arkansas Supreme Court is far from alone in comparing the punitive award under review to speculative penalties that are unrealistic under the circumstances. For example, in an insurance bad faith case, the Ninth Circuit ignored the fact that the $2.4 million punitive award was 480 times the maximum civil fine for violating Arizona's proscription against unfair claims settlement practices, noting that "possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which in this case could be worth hundreds of millions of dollars to Paul Revere." *Greenberg*, 2004 WL 74630, at *2. See also *Myers v. Workmen's Auto Ins. Co.*, 2004 WL 1636753 (Idaho July 23, 2004) (comparing $300,000 punitive award against insurance company for failure to settle plaintiff's accident claim to loss of licensure under the Idaho Trade Practices and Frauds Act). The Seventh Circuit similarly speculated, in a case involving hotel guests who had been bitten by bedbugs, that the defendant hotel "would prefer to pay the punitive damages assessed in this case than to lose its license" due to "unsanitary conditions," which was theoretically authorized under municipal safety statutes. *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 , 678 (7th Cir. 2003). And perhaps most egregious of all, in holding that a $4.5 *billion* punitive award was constitutionally permissible, a federal district court in Alaska ignored the fact that the actual fines paid by Exxon in connection with the grounding of the Exxon Valdez in Prince William Sound were $125 million on the ground that Exxon *could have been fined* $5.1 *billion* had it been convicted of five criminal offenses and made to pay "twice the gross pecuniary loss" for each of them. *In re*

Exxon Valdez, 296 F. Supp. 2d 1071, 107-1109 (D. Alaska 2004) (internal quotation marks and alterations omitted).

Many other courts have refused to give weight to the third guidepost, even when there is a readily available fine with which to compare the punitive award. See, *e.g.*, *Hangarter*, 373 F.3d at 1015 (upholding $5 million punitive award in insurance bad faith case without even acknowledging that fine for violation of California's unfair claim practices statute was $10,000); *Hollock*, 842 A.2d at 422 ($2.8 million punitive award was not "unjustified" in light of "potentially harsh penalties" that could be imposed on insurer for unfair claims handling — $5,000 per-violation fine and suspension of its license); *Trinity Evangelical*, 661 N.W.2d at 803 (refusing to give weight to Wisconsin's $10,000 penalty for unfair claim practices on ground that *State Farm* indicated that criminal penalties have "less utility").[7]

Review is badly needed to correct — once and for all — the pervasive refusal among the lower courts to apply the third guidepost in a principled fashion. In too many situations, including the present case, the third guidepost has ceased to perform its function as a constraining force.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] The Utah Supreme Court took a different tack in the *State Farm* remand. Latching on to the fact that this Court appears to have "endorsed a punitive damages award of $1 million, which is one hundred times greater than the $10,000 fine" established by the Utah legislature for violations of Utah's Unfair Claims Practices Act, the court reasoned that a 100:1 ratio "does not offend due process." *Campbell*, 2004 WL 869188, at *10. It then leaped to the conclusion that a ratio of 902:1 between the punitive damages award and the maximum penalty would also comport with due process. *Ibid.* That bit of logical legerdemain not only drains the third guidepost of any constraining force, but also is affirmatively inconsistent with *BMW*, in which the Court concluded that a disparity of 1,000:1 was an indication that the punitive award at issue was grossly excessive. See 517 U.S. at 584.

Respectfully submitted.

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